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THE ANTITRUST PROCEDURES AND PENALTIES ACT

HEARINGS

BEFORE THE
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS
FIRST SESSION
ON
S. 782
THE ANTITRUST PROCEDURES AND PENALTIES ACT
AND
S. 1088
THE ANTITRUST SETTLEMENT ACT OF 1973

PURSUANT TO S. RES. 56, SECTION 4

MARCH 15, 16 AND APRIL 5, 1973

Printed for the use of the Committee on the Judiciary



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WASHINGTON : 1973

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HEARINGS ON S. 782 AND S. 1088

THURSDAY, MARCH 15, 1973

U.S. SENATE
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., in room 2228, Dirksen Office Building, Senator John Tunney presiding.

Present: Senators John Tunney, Strom Thurmond, Hiram Fong, Edward Gurney, and Roman Hruska.

Also present: Peter N. Chumbris, chief minority counsel; Charles E. Bangert, general counsel; Meldon Levine, legislative assistant to Senator Tunney; Thomas Farrar, legislative assistant to Senator Gurney; Charles Kern, assistant counsel; Patricia Bario, editorial director, and Janice Williams, clerk.

Senator TUNNEY. The hearings of the subcommittee on Antitrust and Monopoly will come to order.

Today we are holding hearings on legislation S. 782, introduced by Senator Gurney and myself, and S. 1088, introduced by Senator Mansfield for Senator Bayh.

The Nation's antitrust laws no longer sufficiently protect the public against abuses by giant corporations. The laws were last amended in 1955—almost two decades ago. Since then, the corporations have grown in power and influence through mergers, and their inner dealings with the Government agencies that supposedly regulate them remain behind closed doors.

Senator Gurney and I have introduced S. 782—the Antitrust Procedures and Penalties Act—to throw open those doors and give the public information about and a voice in the mergers and other actions that so directly affect the quality and the cost of what we buy.

Specifically, our legislation will bring the consent decree process into the full light of day and will increase penalties for offenders. It will make our courts an independent force rather than a rubber stamp in reviewing consent decrees, and it will assure that the courtroom rather than the backroom becomes the final arbiter in antitrust enforcement.

S. 782 has three basic provisions. First, it focuses on the process by which antitrust suits are settled and consent judgments entered by providing specific standards and procedures to assure that the decision to settle and the settlement itself are in fact in the public interest. The Government is required to file and publish any proposed consent decree and a "public impact statement" at least 60 days prior to its effective date. The Government must comment upon any written comments submitted while the decree is pending, and the court,

before entering the proposed decree must determine that it is in the public interest. Moreover, each defendant in the still-pending antitrust suit is required to file a record of its lobbying activities (other than by its counsel of record) relative to the proposed consent decree.

A second basic provision increases the criminal penalties for violations of the antitrust statutes from \$50,000 to \$500,000 for corporations and \$100,000 for any other persons.

The third basic provision revises the Expediting Act in an effort to improve the process of appellate review of antitrust cases. It authorizes the United States to appeal from the denial of a preliminary injunction at the trial court level.

CURRENT PRACTICE

A civil antitrust case is brought by the United States in order to preserve competition in the marketplace. A very high percentage of these cases are settled, thus being concluded in the form of a consent decree. The decree itself usually emerges from a series of private, informal negotiations between lawyers representing the Antitrust Division of the Department of Justice and the attorneys representing the defendant. Pursuant to the Code of Federal Regulations (28 CFR sec. 50.1) the public has a 30-day period to comment to the Department of Justice on a proposed decree. However, the decision to modify the decree on the basis of public comments received is entirely up to the Department. As a recent Law Review article stated:

These views are presented to the Antitrust Division, not the court considering the decree. Consequently, an "affected person's" interests may only be reflected in the consent decree if the Antitrust Division chooses to do so.

The only other avenue of approach for an "affected person," not a party to the suit is by intervention under Rule 24 of the Federal Rules of Civil Procedure. Federal courts have been more than reluctant to permit intervention in the framing or modification of consent decrees. (Flynn, "Consent Decrees in Antitrust Enforcement; Some Thoughts and Proposals," 53 Ia. L. Rev. 983, 1005 (1968).)

Thus, in Federal antitrust litigation, the general rule is that it is the United States "which must alone speak for the public interest." *Buckeye Coal & Railway Co. v. Hocking Railway Co.*, 269 U.S. 42, 49 (1925).

Most recently, in the ITT-Hartford merger case, the Supreme Court denied standing to Reuben Robertson and Ralph Nader to intervene to set aside the consent decree. *U.S. v. ITT Corp. and Hartford Fire Insurance Company*, — F. Supp. —, Civ. Action No. 13320, 41 L.W. 2129 (D.C. Conn., Sept. 6, 1972), aff'd sub. nom. *Nader v. U.S.*—U.S. — (Feb. 20, 1973), 41 L.W. 3447. While our legislation would not provide such intervention as a matter of right, it would help insure that meaningful comment would be provided.

I believe that interested persons should not be denied a meaningful voice in the content of consent decree solutions. The participation of public representatives, many of whom are affected by such settlements, is absolutely essential.

PROPOSED REVISIONS TO CONSENT DECREE PROCESS

The decree provisions in S. 782 can be broken down into four major parts. First, the bill would require that any consent decree be filed with

the court at least 60 days prior to entry of judgment, published and furnished upon request to any person who wishes a copy of its terms. The 60-day time period can be shortened for extraordinary circumstances. Current practice, as I mentioned earlier, provides the public with a 30-day comment period and it would appear that, given the complexities of some antitrust litigation, 60 days would facilitate public study and comment and would hardly be a burdensome requirement.

Second, S. 782 requires that the Government file, also 60 days in advance, a *public impact statement* setting forth *six items* of information with regard to the proposed decree. The items are spelled out in section 2(b) of S. 782 and are relatively self-explanatory. I am certain that we shall explore these in the hearings. In sum, they do not require considerably more information than the complaint, answer and consent decree themselves would provide and, therefore, would not be burdensome requirements. They should help rationalize the consent decree procedure, making it more predictable and understandable—and helping the public to understand better the actual effect and impact of the decree. We have also required that the United States receive and respond to written comments with regard to the public impact statement. If criticisms are offered, the Government should have the opportunity to respond. If a response is difficult the comment might well have pointed up an area in which the decree could be improved.

In providing this mechanism which permits meaningful public comment, we have fashioned our proposed public impact statement upon the already existing environmental impact statement. There have been a number of judicial decisions under the National Environmental Policy Act which have discussed the importance of such environmental impact statements in apprising the public of environmental considerations in proposed actions. At least one of these judicial pronouncements suggests benefits that have been reaped by those impact statements which would also be realized by that which we suggest in S. 782. In *Calvert Cliffs' Coordinating Committee, Inc. v United States Atomic Energy Commission*, 449 F. 2d 1109, 1114 (D.C. Cir. 1971), the court stated that:

The apparent purpose of the "detailed statement" is to aid in the agencies' own decisionmaking process and to advise other interested agencies and the public of the environmental consequences of planned federal action * * *. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decisionmaking process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.

The third major requirement is set forth in section 2(d), in which the bill would require the court to make two determinations with regard to the legislation—determinations that taken together would warrant the clear conclusion that the decree is in the public interest. Alternatives to the specific language of this section have been proposed by a number of sources and I hope the hearings on the legislation will explore them carefully. However, the concept that the trial court judge ought to be independently involved in making the determination that the proposed decree is in the public interest must be preserved. The purpose of section 2(d) is to insure that the court shall exercise its independent judgment in antitrust consent decrees—and not merely act as a rubberstamp upon out-of-court settlements.

The need for this type of a mechanism has been suggested by several commentators. In a recent comment in the *Catholic University Law Review*, the point was made as follows:

As a general rule, consent decrees are accepted and signed by the court as a matter of purely formal routine. If the court, after a brief presentation by defendant's counsel and the Antitrust division attorneys, is satisfied that the parties are in agreement, the requested order is entered with only cursory examination. Ordinarily, no record is made of the proceedings. Findings of facts or conclusions of law are not made, nor are they required. The Justice Department need not prepare a written statement of facts upon which the government bases its case, nor declare what it expects to accomplish through the decree. Similarly, the court is not required to render a written opinion. This is so notwithstanding the fact: (1) the final order is treated as a final judgment; (2) the terms of the consent decree may become the standard for an entire industry; and (3) traditional competitors of the defendant are denied the right to intervene and object to the entry of the decree and, therefore, may be adversely affected in their business operations. (Comment, "Consent Decrees and the Judicial Function," 20 *Cath. U. L. Rev.* 312, 316 (1970).)

Thus, " * * * the court is presented with a negotiated 'contract' with little or no understanding of its background, content, or consequences, and mechanically performs the rite of stamping the contract with the approval of the judiciary." Flynn, *op. cit.* at 990. Further, there is " * * * a strong danger * * * that continued rubberstamp approval of consent decrees by the courts will result in the complete abdication of the contemplated judicial function in favor of an administrative procedure in which there are no rules to safeguard the interests of the public." Comment, *Cath. U. L. Rev.*, *op. cit.* at 326.

Our proposed change in S. 782 would help assure the public and the antitrust participants that the court will, in fact, serve as another factor to safeguard the public interest.

The next section, 2(e), supplements 2(d). It offers certain procedures which might help the court to make that determination—the determination that the decree is, in fact, in the public interest. S. 782 does not spell out any area of new judicial authority, however, and it is conceivable that this subcommittee might conclude that section 2(e) or some aspects thereof should be revised. I will be interested in the views of the witnesses on this subject.

The fourth major provision in the consent decree legislation requires each defendant in the still-pending antitrust suit to file with the court a description of all communications its representatives have had with representatives of the Federal Government, other than discussions between counsel of record and Government representatives. I believe that this concept is a sound one. By requiring a listing of discussions between Government representatives and the defendant, corporate defendants will at least think twice before deciding to request intercession by members of either the executive or legislative branch. Here, too, the basic theory is simple: public disclosure is the best guarantee of a sound decision on the merits.

We have, as I believe is clear, attempted to improve and maintain the current consent decree procedures. We do not wish to weaken or eliminate them. We believe—we are convinced—that the disclosure that we seek will benefit the Government, the economy, and the public at large.

INCREASE IN CRIMINAL PENALTIES

An increase in the maximum criminal penalties in the Sherman Antitrust Act (15 U.S.C. secs. 1-3) from \$50,000 to \$500,000 for corporations and \$100,000 for other persons is long overdue. The criminal sanctions of the Sherman Act are designed to deter illegal conduct and practices which prevent effective competition. Because of the small amount of the present fine for criminal violations of that act, it no longer represents a real deterrent to antitrust violations. Increasing the fine would help to insure that it will not be in the violator's financial interest to pay the penalty and continue the forbidden practice.

The maximum penalties prescribed in the bill are but a realistic reflection of the modern-day marketplace, and, in my opinion, would impose a penalty to fit the gravity of the offense. As to the murmuring that this increase would be a death knell to small business, two points must be remembered. First, the penalty is a ceiling and not a floor. Second, discretion is provided to the Department of Justice in recommending the amount of the fine, and to the courts in imposing it. They will consider, as they do now, such factors as the means and circumstances of the defendant, the practice involved, the duration of the violation, the degree of culpability, and the effect on the economy. Therefore, a statutory increase of the maximum fines would not place an undue hardship upon small business enterprises.

It has been argued that the maximum fine need not be increased when even now it is seldom imposed. Yet, corporations have grown dramatically in size and in power, and, for those corporate giants who must at times be deterred from and punished for illegal conduct, the current maximum fine is wholly inadequate.

As recently as 1 month ago, Chairman of the Federal Reserve Board Arthur Burns stated that we need to take the inflation fight more seriously. He then cited the need for heavier antitrust fines and penalties as a top priority.

In a letter of September 1969, Attorney General John Mitchell urged prompt enactment of this important measure. In the hearings of March 1970, there was near unanimity in the support of the same penalty increases as provided in the bill before us today.

Only a combination of heavier fines and their effective use will deter antitrust violators in the future.

REVISIONS TO THE EXPEDITING ACT

Provisions of S. 782 to revise the Expediting Act must be debated thoroughly. I have supported these provisions because I believe the debate must be held now.

At present, appeals from district court decisions must be made directly to the Supreme Court. Many feel that direct appeals provide inadequate fact review, and they are unnecessary and inappropriate in the great majority of cases. Civil antitrust appeals also place a great burden on the Supreme Court. Under section 4 of S. 782, direct appeal is eliminated in most cases. The intermediate court, the courts of ap-

peals, which had been in existence only 12 years when the Expediting Act was enacted are now fully established as the normal channel of appeals.

While I see considerable merits to this position, two of its assumptions must be examined: (1) Is the Supreme Court, in fact, overburdened to such an extent that such legislation is necessary? (2) Will the change in forums actually facilitate anti-trust enforcement? I shall address those questions to the witnesses.

Section 5(a) of S. 782 would amend the Expediting Act to provide interlocutory appeal to the appellate courts. It has been held, most recently in the Supreme Court in *Tide-Water Oil Co. v. United States*,

— U.S. — (1972), that there can be no interlocutory review under the Sherman Act of orders in actions brought by the Government for relief. Such review is also barred in Government antitrust cases by section 2 of the Expediting Act. Because orders of a preliminary or interlocutory nature may not be revised until completion of the case, enforcement efforts are often delayed. The proposed revision of the Expediting Act in the bill would solve this antitrust enforcement problem and remove any confusion and uncertainty of such a situation.

Finally, I would like to raise one additional point with regard to the bill as a whole.

I do believe that its contents will vastly improve antitrust enforcement, especially in the consent decree area. But it is true that the provisions in the bill are most necessary in so-called "important" cases. Further, of the arguments raised in opposition to the consent decree provisions of the legislation, that argument which causes one the most concern is the suggestion that these provisions could burden the Antitrust Division and divert resources from other enforcement tasks.

I believe that argument has been exaggerated and that, especially with a careful markup of this bill, such concerns will be minimized.

Nevertheless, to alleviate some of those concerns, I wonder if it might be advisable to introduce a trigger in the bill so that its provisions—or at least its consent decree provisions—would be applicable only in important cases. I do not know how we would define an important case, but perhaps some definition could be devised which would facilitate effective application of this law. I will ask the witnesses for their views on this matter as well.

I will also be interested in the views of the witnesses on S. 1088, introduced by Senator Birch Bayh, which also would revise consent decree procedures.

A section-by-section analysis of S. 782 and a copy of the statement I made when Senator Gurney and I introduced this legislation in the 92d Congress, as S. 4014, are submitted for the record.

I am looking forward to hearing the views of the witnesses on this legislation, which I believe will improve greatly our Nation's anti-trust enforcement effort.

Senator Gurney?

Senator GURNEY. It is a pleasure to welcome these distinguished witnesses to these hearings today on S. 782, the bill introduced by Senator Tunney and myself, on the Antitrust Procedures and Penalties Act.

I am sure their testimony will be of great assistance to the subcommittee as we consider this legislation.

The consent decree is an important and useful tool in the enforcement of our antitrust laws. The Antitrust Procedures and Penalties Act, by amending the existing antitrust laws to make more information available to the courts and to the public about proposed consent decree settlements of antitrust cases, promises to shape the consent decree into a more important and more effective device.

This, in turn, should enhance the very free enterprise business system which the antitrust laws themselves are designed to protect.

The importance of consent decrees is difficult to understate. The vast bulk of antitrust judgments entered annually are implemented by these decrees.

Consider, for example, the following statistics regarding the use of consent judgments. During the years from 1955 to 1967, 81 percent of all antitrust judgments were represented by consent decrees.

The annual percentage of antitrust judgments represented by consent decrees during the period 1955 to 1972 are represented by the following table. I won't bother to go through these.

[The document follows:]

	<i>Percent</i>		<i>Percent</i>
1955 -----	91	1964 -----	88
1956 -----	91	1965 -----	75
1957 -----	88	1966 -----	80
1958 -----	88	1967 -----	53
1959 -----	82	1968 -----	66
1960 -----	100	1969 -----	57
1961 -----	70	1970 -----	84
1962 -----	100	1971 -----	93
1963 -----	82	1972 -----	76

Senator GURNEY. It shows again the numbers of antitrust consent decrees and these figures certainly indicate the importance of the consent decree in antitrust enforcement.

In none of the 18 years listed did the percentage of consent decrees constitute less than half the total number of judgments in antitrust litigation.

In only 2 years, 1963 and 1969, did the percentage even approach the 50 percent mark, and in 2 years, 1960 and 1962, 100 percent of all the judgments entered were pursuant to the consent decree.

The antitrust laws of the United States are the bulwark of our free enterprise system. Without effective operation of the laws against trust and monopoly power, competition is eroded and the quality of our commerce is correspondingly reduced.

Competition in the marketplace is virtually indispensable to the production of high quality goods at the lowest possible price. Without it, the advantages of a free enterprise system are lost, with consequent loss of efficiency and economy.

Now, the Antitrust Procedures and Penalties Act is designed to enhance the value and effectiveness of the consent decree as a tool of public policy.

Specifically, the bill establishes a specific but reasonable set of standards and guidelines to govern the settlement of antitrust cases and, in particular, the procedures by which consent judgments are entered into.

Its most important advantage will be to increase public confidence in the administration of antitrust settlements, by expanding upon existing law without working undue hardship.

The first section of S. 782 would require that any consent decree proposed by the Department of Justice must be filed with the court and published in the Federal Register 60 days before it is intended to take effect.

At the same time, the Department would be required to file a "public impact" statement, analogous to that required under the National Environmental Protection Act, listing information on the case, the settlement proposed, the remedies available to potential private plaintiffs damaged by the alleged violation, a description of the alternatives to the settlement, and the anticipated effects of such alternatives.

The extra time and additional information that the bill thus requires is for the purpose of encouraging, and in some cases soliciting, additional information and public comment that will assist the court in deciding whether the decree should be granted.

To insure that public comment receives consideration, a further provision requires that the Justice Department file a formal response to it.

The bill further requires that the court accept a proposed consent decree only after it determines that to do so is in the public interest. This is a particularly important provision, since after entry of a consent decree it is often difficult for private parties to recover redress for antitrust injuries.

In some cases, the court may find that it is more in the public interest, for this reason and others, that the case go to trial instead of being settled by agreement.

It is not the purpose of S. 782 to undo the effectiveness of the consent decree. The bill explicitly provides that proceedings before the district court in connection either with the decree itself or the required public impact statements are not admissible against any defendant in any antitrust action, nor may they be used as a basis for introduction of the decree itself as evidence.

By declining to give it prima facie effect as a matter of law, the attractiveness of the consent decree is thereby preserved.

The other portions of the bill are valuable too. They raise the penalties for criminal violations of the antitrust laws, and improve the appellate procedures for antitrust cases.

This will help solve the inadequacies of the present \$50,000 maximum fine. And providing for immediate review of cases of general public importance will benefit everyone concerned, either as an individual connected with the suit itself or as a member of the general public.

Mr. Chairman, I don't think we have ever had any "perfect" legislation before Congress, and I expect that the Tunney-Gurney bill may prove to be subject to modifications.

That is the immeasurable value of hearings such as this, and why I am so pleased to receive suggestions for improvements from the distinguished witnesses who are scheduled to testify before this subcommittee today and at our later hearings.

Again, I am pleased to welcome them and look forward to their testimony.

Senator TUNNEY. Thank you very much, Senator.

Senator HRUSKA?

Senator HRUSKA. Mr. Chairman, out of deference to the convenience of the witnesses who will appear here, I will refrain at this time from entering a statement or speaking.

Senator TUNNEY. Thank you very much, Senator Hruska.

Our first witnesses are Prof. Harvey Goldschmid and Mr. Greg Gregorich, who is an attorney at law.

Both gentlemen are representing the Committee on Trade Regulation of the Association of the Bar of the city of New York.

Welcome.

STATEMENT OF PROF. HARVEY J. GOLDSCHMID, COLUMBIA UNIVERSITY SCHOOL OF LAW, AND GREGOR F. GREGORICH, ATTORNEY. REPRESENTING THE COMMITTEE ON TRADE REGULATION OF THE ASSOCIATION OF THE BAR, CITY OF NEW YORK

Dr. GOLDSCHMID. Mr. Chairman, I am Professor Goldschmid.

We appreciate the opportunity to appear here. I am associate professor of law at Columbia University School of Law. I teach in the antitrust field.

I am appearing here, as you indicated, for the Association of the Bar in my capacity as chairman of its Committee on Trade Regulation.

The Committee on Trade Regulation has primary jurisdiction over antitrust matters in the association, and deals with all matters involving antitrust and the FTC.

Speaking for the committee, I am also speaking for the association.

Testifying with me is Greg Gregorich. He is with the firm of Rogers, Hoge, & Hills of New York. He is chairman of the subcommittee of my committee which reported on the bill.

I will generally summarize our conclusions. Mr. Gregorich will speak to the specifics and details of the bill. We will not address ourselves to Senator Bayh's bill, S. 1088. The problem there is that the bill was submitted too late for our committee's consideration.

I would be glad to answer questions, as would Mr. Gregorich, on other aspects of either your bill or that bill.

Our conclusions, in general, on the S. 782 are quite favorable. The committee was closely divided on only one major portion of the bill, and that was the public impact statement in consent decrees.

Those favoring the public impact statement basically feel that it would provide a helpful set of standards for the Antitrust Division in evaluating its own consent decrees. It would force the lawyers of the Division to think out the decree, its provisions, and all else.

Moreover, it should be of real help to interested third parties in the public at large in evaluating what is happening in consent decree proceedings.

Still more important, perhaps, is the aid it will offer to the district court.

On all of those bases, the majority of the committee supports the consent decree "public impact" section of the bill.

The dissenters on the committee, or those who were opposed, were concerned about the matters you indicated—fears of taking too much time from the court, the Justice Department, of holding back in some way consent decrees.

I voted in favor of the bill and strongly support that provision.

Second, other provisions of the bill in the consent decree area were strongly supported. We agree that the district court should not be a rubber stamp in any form, and it does need the material the bill provides.

There are two sections that we think should, however, be deleted, these are sections 2(d) and 2(e) of the bill.

Section 2(d) sets out the standard that a consent decree is to be in the "public interest". The fear of the committee was that the standard was vague enough to allow the introduction of extraneous matters, or irrelevant matters, in making determinations as to the viability of the consent decree.

We admit, and it is true, of course, that the present standards for consent decree are, indeed, very vague. General equitable principles are used.

We do think, however, that a case-by-case approach would be better than the Senate or House at this point, putting its mark of approval on a broad scope of review of consent decrees that would take into account extraneous matters.

Here, I have in mind, I suppose, matters like those taken into account in the ITT consent decree proceeding—matters involving shareholders of ITT, foreign trade, stock markets—extraneous matters to the fundamental goals of antitrust.

The second provision we think ought to be deleted is section 2(e) of the bill, which sets out certain discretionary procedures open to the district court.

We think those are already available. The district court already has all of the power it needs to evaluate consent decrees and, indeed, there is some danger section 2(e) will be read as somehow limiting the district court.

The provisions of the bill that will afford the district court the help of the Antitrust Division in terms of the impact statement, the amicus situation for intervenors, along with their comments being available, should generally provide the district court with all the help it needs, although it may go further if it thinks other steps should be taken.

Another provision of the bill we strongly support is the disclosure of lobbying provision. The committee was unanimous on that.

We again strongly support the penalties provisions. Indeed, in my own view, they appear to me very moderate and perhaps too low. The committee strongly supports them on the basis of the deterrence effect.

The committee would go further than the bill itself with respect to the Expediting Act. Here we advocate outright appeal.

In these days, when the Supreme Court's docket is so loaded, the difficulties for Justices are great and, we think that the Court ought to have control over its docket. In effect, antitrust cases should proceed on the same basis as cases in the civil rights or other areas.

And we think it would just as helpful—the Court, of course, would take important cases, and there are ways of getting appeals directly from the district court even under present law to the Supreme Court, though they have seldom been used. We think there would be great advantage to that.

If, however, the Expediting Act is not repealed, we suggest that certain changes be made: one, to allow interlocutory relief in a general way, as in all other cases; and, secondly, to delete the provision whereby the Attorney General, on his own and without the approval of the court, can bring cases before the Supreme Court.

We think an even-handed approach here would make sense; that for appeals to go directly to the Supreme Court—it should be either *sua sponte* by the district judge, as the bill presently calls for, or on the petition of either party.

There is no reason, we think, to give either party an advantage in such a situation.

Greg?

Mr. GREGORICH. Senator Tunney, Senators, do you wish to have me place my preliminary statement in the record at this time?

Senator TUNNEY. Yes, why don't you? We have your statement before us. We can include it in the record as if read, and if you want to summarize it, fine. If you want to make any departures from it, that is fine. Whatever you chose to do, but your statement will be in the record at this point.

[The document follows. Testimony resumes on p. 18.]

REPORT ON THE ANTITRUST PROCEDURES AND PENALTIES ACT, S. 782, BY THE COMMITTEE ON TRADE REGULATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

I. INTRODUCTION

During the 92d Congress, Senator Tunney (D-Cal.) introduced S. 4014 and, with minor changes, reintroduced it on February 6, 1973 to the 93d Congress as S. 782 ("the bill"). The bill has the aim of regulating Government antitrust suits by (a) subjecting settlement negotiations to greater public scrutiny by requiring the Justice Department to file a detailed "public impact statement" with respect to any proposed consent decree and setting up a 60-day public comment period; (b) requiring disclosure by the settling defendant of any lobbying with Government officials concerning the terms of the consent decree; (c) increasing maximum fines in criminal Sherman Act cases from \$50,000 to \$100,000 for individuals and to \$500,000 for corporations; and (d) eliminating direct appeals to the Supreme Court except in cases deemed of "general public importance in the administration of justice."

It is evident that the bill treads into politically sensitive territory. Senator Tunney's remarks on the floor of the Senate made it clear that some impetus for the bill had been provided by the public disclosure of a meeting between the chairman of a large conglomerate and the Attorney General during the pendency of Government litigation against that corporation. With respect to the "lobbying" provision of the bill, Senator Tunney stated:

"In operation, the provision would require disclosure, for example, of a meeting between a corporate official and a cabinet officer discussing 'antitrust policy' during the pendency of antitrust litigation against that corporation. The disclosure intended is a disclosure of the fact of the meeting and the general subject matter."¹

It is equally evident, however, that irrespective of its recent political catalyst, the bill proposes to significantly supplement the antitrust laws for the generality

¹ 118 Cong. Rec. S.15,553 (daily ed., Sept. 21, 1972).

of cases and should be weighed on its merits against present and future needs in the regulation of commerce. It is well to keep in mind in such an appraisal that S. 782 does not alter present law (15 U.S.C. § 16(a)) which precludes the use of a consent decree (entered before the taking of testimony) in any subsequent litigation as *prima facie* evidence of violation. No part of any proceedings in the district court under the provisions of the bill, nor the public impact statement itself, would be admissible in subsequent antitrust litigation. Whatever the present nature of consent decrees is, S. 782 would work no change. The bill would add a subsection to section 5 of the Clayton Act, which would make this policy express: "The basic reason for including this provision is to preserve the consent decree as a substantial enforcement tool by declining to give it *prima facie* effect as a matter of law."

While this policy may be criticized by some, it will meet with approval by a majority of the antitrust bar which recognizes the effectiveness of the consent decree as a valuable enforcement tool and knows that over 8 percent of civil antitrust suits brought by the Justice Department are disposed of through the consent decree procedure. Measures, therefore, which would discourage the negotiation of consent decrees by a change in the no-*prima-facie-effect* proviso of section 5 of the Clayton Act have not been favored by the Committee on Trade Regulation of the Association of the Bar of the City of New York ("the Committee") and are not found in S. 782.

The committee favors adoption of S. 782 insofar as it relates to consent decree procedures, with the modifications indicated in section II of this report. We believe these provisions will, if adopted, significantly improve the content of consent decrees, assist Government attorneys in recognizing the effect of a proposed decree on commerce and the public, and dispel the atmosphere of apparent impropriety which occasionally surrounds contacts between Government decision-makers and corporate officials. The committee also advocates adoption of the provisions of the bill providing for increased penalties (discussed in section III of this report) since we believe these provisions will increase compliance with the strictures of the antitrust laws. The committee, however, goes even further than S. 782 with respect to the Expediting Act (see section IV of this report). It advocates outright repeal. If, however, repeal is not possible at this time, the committee recommends certain changes in the provisions of S. 782 which revise the Expediting Act. The committee recommends adoption of all other provisions of the bill.

II. CONSENT DECREE PROCEDURES

A. Impact statement and related matters

The 60-day hiatus between filing of a proposed consent judgment (coupled with publication in the Federal Register) and the effective date of the decree (section 2(b) of the bill) is sensible and unexceptional. It constitutes an expansion of present practice of the Department of Justice from 30 to 60 days and seeks to insure adequate public notice and availability of the text to interested parties on request.

Of great significance, however, is the requirement that the Government simultaneously file with the court a public impact statement, reciting:

- "(1) the nature of the proceeding;
- "(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
- "(3) an explanation of the proposed judgment, relief to be obtained thereby and the anticipated effects on competition of that relief, including an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein;
- "(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the proposed judgment is entered;
- "(5) a description of the procedures available for modification of the proposed judgment;
- "(6) a description and evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives."³

The majority of the committee, in a closely divided vote, concluded that the public impact statement would have the salutary effect of increasing public

¹ 118 Cong. Rec., S.15,553 (daily ed., Sept. 21, 1972) (remarks of Senator Tunney).

³ New section 5(b) of the Clayton Act proposed by section 2 of the bill.

understanding of what is about to happen and why in consent decree proceedings. Interested parties could more easily determine whether and how their economic interests would be affected. The quality of comments, which are presently received, but hardly encouraged, may improve. Most significantly, however, the public impact statement serves to focus the negotiating Government attorneys on the precise issues to be considered in the public interest. In that regard, Senator Tunney consciously used the analogy contained in the National Environmental Protection Act.⁴ The NEPA provisions gave all agencies of the Federal Government the difficult task, for example, to "develop methods * * * which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic * * * considerations."⁵

In addition, all agencies must, in every recommendation or report on legislation and major actions "significantly affecting the quality of the human environment," include and publish a detailed statement on:

- "(i) the environmental impact of the proposed action,
- "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- "(iii) alternatives to the proposed action,
- "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."⁶

These NEPA provisions, despite their apparent complexity, appear to be working well with desirable effects on the environment.⁷ In general, federal courts, including the Supreme Court, have shown that they are fully capable of dealing with novel environmental issues.⁸

The public impact statement requirement of the bill, if enacted, would seem to pose considerably fewer problems to the Justice Department than NEPA initially did to other Government agencies. By contrast with NEPA, all portions of the antitrust public impact statement lie within the expertise of the agency charged with the responsibility of authorship. All of its aspects, similarly, lie in the normal expertise expected of Federal district judges.

Committee members opposing inclusion of a public impact statement note that much of the material called for by the statement is already included in Government presentations in support of consent judgments. They are concerned that (a) formalization of these procedures would give rise to litigable issues concerning the adequacy of impact statements with resultant additional delay, burden and expense; (b) the requirement for disclosure of "unusual circumstances" will narrow the Government's discretion in settling suits improvidently commenced or in cases where settlement is dictated by factors which, though legitimate, are not the type which the Government wishes to make matters of record; and (c) the filing of a public blueprint for avenues of redress available to potential private plaintiffs may well discourage defendants from entering into consent judgments.

In short, they believe that the proposed public impact statement provisions may substantially hamper use of consent judgments, thereby further burdening Federal courts which, in many districts, are already close to the breaking point.

It is the expectation of the majority of the Committee, however, that the filing of an impact statement will encourage district courts, which now generally decline to inquire into the merits of proposed antitrust consent decrees, to review such settlements in appropriate instances.⁹

⁴ 42 U.S.C. §§ 4321-4347. The provisions regarding formulation of the environmental impact statement are codified at § 4332.

⁵ 42 U.S.C. § 4332(b).

⁶ 42 U.S.C. § 4332(c).

⁷ Compare *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); 2 ERC 1422; *Environmental Defense Fund v. Corps of Engineers*, 325 F.Supp. 749 (E.D.Ark. 1971); 2 ERC 1266; *Wilderness Society v. Hickel*, 325 F.Supp. 422 (D.C.D.C. 1970); 1 ERC 1335, with *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971), 3 ERC 1276.

⁸ See e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) 2 ERC 1279.

⁹ The Ninth District has stated that, from a practical standpoint, judicial approval of a consent decree is "a forgone conclusion." *City of Burbank v. General Electric Co.*, 329 F.2d 825, 821 (9th Cir. 1964), see Handler, *The Shift From Substantive to Procedural Litigation in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 23 (1971).

A consent decree is not exclusively a contract but rather a legal hybrid which exhibits "the features of both contract and judicial act."¹⁰ Logic dictates that in antitrust cases which have a significant impact on the public, just as in decree modification proceedings, the judge should have material before him which will enable him to see to it that substantial justice is being done.

The Committee, however, recommends deletion of Sections 2(d) and (e) of the bill. Section 2(d) provides that the court "shall determine that entry of that judgment is in the public interest" and it shall consider:

"(1) the public impact of the judgment, including termination of alleged violation, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies, and any other considerations bearing upon the adequacy of the judgment;

"(2) the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit to be derived from a determination of the issues at trial."

The Committee believes that this standard may encourage the courts to consider irrelevant or extraneous issues. Moreover, it appears to afford no significant advantage or protection to the public not already provided by present law. Under the present standard the court may enter the decree if it concludes that the relief afforded is equitable and consistent with the objectives of the Government complaint.¹¹ In making the required determination under these provisions of the bill, the court would have discretionary procedural devices available¹² including taking testimony of Government officials or experts; appointment of a special master under FRCP 53 or of consultants; solicitation of advice from individuals, groups or agencies; authorization of participation in its proceedings by interested persons as amici curiae and of intervention under FRCP 24; review of comments received; and other action deemed appropriate. The Committee believes a district court already has all the procedural tools necessary to effectively evaluate a consent decree. The enumeration provided in the bill may, indeed, be read (contrary to Senator Tunney's intention) as a limitation upon a district court's discretion.

B. Disclosure of lobbying

The lobbying disclosure feature of the bill¹³ is also its most innovative. Section 2(f) of the bill provides:

"(f) Not later than ten days following the filing of any proposed consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, * * * with any officer or employee of the United States concerning or relevant to the proposed consent judgment * * *."

The intent of the provision is to disclose the manner and extent of corporate influence and to record access to Governmental decisionmakers by representatives of the affected companies with respect to the content of a proposed consent judgment. Exempted are contacts by counsel of record. This may be an exception too narrow for some social tastes and too wide for others, but it seems just right to the committee. It should be noted, however, that the exception is not intended to allow for extensive lobbying "by a horde of 'counsel of record'."¹⁴

An analogy to this provision is found in the Federal Regulation of Lobbying Act.¹⁵ The act requires lobbyists to register with the Clerk of the House of Representatives before taking action designed to influence Federal legislation. The provision is a criminal statute, but does not abridge constitutionally guaranteed privileges of freedom of speech, press, or petition.¹⁶ By contrast with the latter legislation, the bill merely requires the corporation concerned to file with the district court, prior to the entry of a consent judgment, a certification that it has complied with the requirements of this section and that the filing itself is a true and complete description of such communications. No criminal penalties are provided in the bill for a failure to make the certification or for a false certifica-

¹⁰ Handler, *Twenty-Fourth Annual Antitrust Review*, 26 *The Record of the Association of the Bar of the City of New York* 789 (1971).

¹¹ *United States v. Carter Products, Inc.*, 211 F.Supp. 144 (S.D.N.Y. 1962).

¹² New section 5(e) (1)-(5) of the Clayton Act proposed by section 2 of the bill.

¹³ New section 5(f) of the Clayton Act proposed by the bill.

¹⁴ 118 Cong. Rec. S. 15553 (daily ed., Sept. 21, 1972) (remarks of Senator Tunney).

¹⁵ 2 U.S.C. § 261 et seq.

¹⁶ *United States v. Harriss*, 347 U.S. 612 (1954).

tion; the normal remedies available are those which exist for contempt of court or perjury.

The committee favors the innovative lobbying disclosure feature. It is important to subject contacts between Government decisionmakers and representatives of powerful corporations to this kind of therapeutic ventilation. Much will be gained by making it clear that any activity which seeks to influence a pending antitrust case through pressure on the Congress or the Executive is subject to public view. It will create desirable attitudes of self-consciousness and will improve the atmosphere in which the Antitrust Division must occasionally operate. Such legislation, however, cannot interfere with normal settlement negotiations by counsel of record. It will not interfere with the necessary and untrammelled fraternization and hard bargaining among opposing counsel across front lines of the litigation, but it will remedy the occasional appearance of impropriety (whether warranted or not) which results from meetings between powerful corporate executives and Governmental decisionmakers in the midst of an important antitrust suit.

The last consent decree provision (section 2(g) of the bill) is a welcome and clear addition to the no-prima-facie-effect proviso of 15 U.S.C. § 16(a). Neither the proceedings undertaken by the court to establish the public impact of the proposed consent decree nor the public impact statement itself is admissible in any subsequent antitrust action brought by anyone. Also, neither one nor the other constitutes a basis for the introduction of the consent judgment as prima facie evidence against the defendant corporation in any subsequent action.¹⁷

III. PENALTIES

The penalties of Sections 1, 2, and 3 of the Sherman Act,¹⁸ which presently are limited to a maximum of \$50,000, would each be increased so as to provide "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars."¹⁹ The purpose of this provision is, of course, increased deterrence and it seems sensible since it would give the district judge a greater range of amounts from which to select a fine better calculated to fit the crime. Nor do the maximums shock the modern conscience. An analogy was furnished recently in a non-antitrust context, when Federal District Judge Joiner fined Ford Motor Co. \$3.5 million on 350 uncontested counts charging criminal violations of the Clean Air Act²⁰ by tampering with engines to make them pass Federal air pollution standards; at the same time the automaker and the Government entered into a consent decree that included \$3.5 million in additional civil penalties, for a total of \$7 million.²¹ The assistant U.S. attorney on the case stated that the large fine "helps demonstrate that the Government means business in enforcing the provisions for the Clean Air Act."²² It will hardly be argued that it is any less important to show the Government means business in enforcing compliance with the Sherman Act.

The committee, therefore, approves of the increase of the penalties provided.

IV. EXPEDITING ACT PROVISIONS

A. *Recommended repeal of the Expediting Act*

This committee adheres to the views on the Expediting Act²³ expressed by its predecessor in letters addressed to Senator Tydings in 1968 and 1969. The committee recommends that the Expediting Act be repealed insofar as it applies to civil antitrust cases.

The Expediting Act became law in 1903 when the Sherman Act and the Interstate Commerce Act were 13 and 16 years old, respectively. The structure of the Expediting Act involves two concepts. First, in civil antitrust suits brought by the United States, deemed of general public importance, the Attorney General can, by filing a certificate, cause the convening of a three-judge court for an expeditious trial. Second, in all Government civil antitrust cases only appeals from final judgments are permitted; such appeals are of right and lie only in the

¹⁷ New section 5(g) of the Clayton Act proposed by the bill.

¹⁸ 26 Stat. 209; 15 U.S.C. §§ 1, 2, and 3.

¹⁹ Section 3 of the Tunney bill.

²⁰ 42 U.S.C. 1857 et seq.

²¹ The Wall Street Journal, Feb. 14, 1973, at 4.

²² The New York Times, Feb. 14, 1973, at 1.

²³ 15 U.S.C. §§ 28, 29; 49 U.S.C. §§ 44, 45.

Supreme Court. Under the Expediting Act, no intermediate appeal to the court of appeals is permitted and there is, therefore, no interlocutory appeal at all. Practice under the Expediting Act has been criticized because the absence of intermediate appeal often forces the Supreme Court unwilling to note jurisdiction because our system demands at least one appellate review: then such cases are often given only summary attention. The Supreme Court has, on occasion, joined critics of the present Expediting Act:

"Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory * * *. Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."²⁴

A more precise critique of the Expediting Act was made by Justice Harlan in *Brown Shoe*:²⁵

"At this period of mounting dockets there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single district judge's findings of fact are supportable. The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law. And under modern conditions it may well be doubted whether direct review of such cases by this Court truly serves the purpose of expedition which underlay the original passage of the Expediting Act. I venture to predict that a critical reappraisal of the problem would lead to the conclusion that 'expedition' and also, overall, more satisfactory appellate review would be achieved in these cases were primary appellate jurisdiction returned to the court of appeals, leaving this Court free to exercise its certiorari power with respect to particular cases deemed deserving of further review. As things now stand this Court must deal with all government civil antitrust cases, often either at the unnecessary expenditures of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made."²⁶

Criticism of the Expediting Act may be summarized as follows:

First, there is no provision for interlocutory appeals from the granting or denial of any preliminary injunction, or in other circumstances where interlocutory appeal would ordinarily be available under 28 U.S.C. § 1292. Second, appeals in Government antitrust cases go directly from the district court to the Supreme Court, entirely bypassing the courts of appeals. In the event that the Supreme Court allows a full-scale appeal, it faces a host of issues such as admissibility and adequacy of evidence, which are important to the litigants but hardly of great significance to the national antitrust jurisprudence. These issues are more appropriately left to the courts of appeals. On the other hand, if as is frequently the case, the Supreme Court decides the appeal on the basis of a jurisdictional statement and a motion to dismiss (or affirm), the parties are deprived of any full-scale appellate review of the trial court's decision.

Finally, the development of a coherent and consistent body of antitrust doctrine no longer provides a valid reason for direct appeals. Many novel and important antitrust concepts are developed in private litigation or proceedings instituted by the Federal Trade Commission, in which the appeal is to an appropriate court of appeals, not directly to the Supreme Court. There is no reason now why the choice of the forum or the identity of the plaintiff should dictate bypassing normal appellate processes; and coherence and consistency of jurisprudence can best be achieved through normal Supreme Court review on certiorari.

28 U.S.C. § 1254(1) already provides a means for expeditious Supreme Court review. Under this provision, in a case appealed from a district court, the Supreme Court may grant certiorari before, as well as after, a judgment has been entered by the court of appeals. Although seldom used to date, Section 1254(1) provides for an expedited appeal of cases of public importance, but unlike the Expediting Act, by allowing the Court to take such cases at its discretion, does not wrest from the Court control over its docket. The procedure under section 1254(1) should be retained and expanded so as to provide a means whereby

²⁴ *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 175 n. 1 (1963).

²⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

²⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344-65 (1962) (Justice Harlan concurring in part and dissenting in part).

cases of importance under the antitrust laws may receive expeditious Supreme Court review.

B. Proposed changes in Expediting Act revisions provided in the bill

In the event that the Congress decides against outright appeal of the Expediting Act, the committee suggests that changes be made in section 4 of the bill. Section 4 of the bill would still allow the Attorney General to start the ball rolling in cases seeking equitable relief by the filing of a certificate (that in his opinion the case is of general public importance) with the district court prior to entry of final judgment. The result is not a three-judge court, but merely mandatory expedition by a single district judge.

Next, the amended second part (15 U.S.C. § 29) would provide for appeal to the court of appeals from any final judgment under 28 U.S.C. §§ 1291. Interlocutory appeals to the court of appeals under 28 U.S.C. §§ 1292(a)(1) "but not otherwise" are also provided. And any judgment is subject to review by the Supreme Court in its normal, discretionary exercise of certiorari procedure under 28 U.S.C. § 1254(1).

Direct appeal to the Supreme Court lies only from final judgments and only if (a) the trial judge, on application of a party or sua sponte, enters an order stating that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice" or (b) the Attorney General files a certificate stating the same thing.

While these provisions of the bill would remedy many of the failings of the Expediting Act criticized, the Committee believes that two features of the proposed amendments bear reexamination. The proposed legislation authorizes interlocutory appeals only from the granting or denial of a preliminary injunction, but not otherwise. The proposed legislation ought to provide interlocutory appeal under 28 U.S.C. § 1292(b) where appropriate, just as in private antitrust and other litigation.

More significantly, however, the bill retains, in vestigial form, the right of direct appeal to the Supreme Court in unusual cases, but by procedures which raise fundamental questions of fairness. Direct appeal to the Supreme Court is available if, after judgment, the Attorney General files a certificate. There is no reason to allow the Attorney General (or the defendant) such an opportunity for forum-shopping. One of the two litigants should not, on its own motion, be able to deprive the other of appeal to a tribunal which would normally pass upon the case. To be sure, the district court sua sponte or on motion of the defendant, can file a similar certificate, but that does not remedy the disparity in procedural rights. We recommend the deletion of Section 5(b)(2) which allows the Attorney General, at his sole discretion, to mandate appeal to the Supreme Court.²⁷

For these reasons, the committee recommends repeal of the Expediting Act or, at a minimum, enactment of a provision (a) granting both sides in Government antitrust cases all appellate rights now available in other cases under 28 U.S.C. § 1292, and (b) insuring that both parties have identical rights with respect to direct appeal to the Supreme Court.

We recommend adoption of the other provisions of S. 782 which would require the filing of a public impact statement and increase the penalties in criminal cases.

Respectfully submitted,

COMMITTEE ON TRADE REGULATIONS, HARVEY J. GOLDSCHMID, *Chairman*;
Harland Blake; Roger Boyle; Thomas A. Dieterich; John A.
Donovan; Eleanor Fox; James B. Gambrell; Stanley Godofsky,
Gregory F. Gregorich; Blanche Livingston; Michael Malina; Jud-
son A. Parsons, Jr.; Haven C. Roosevelt; Irving Scher; Richard
Sexton; Philip T. Shannon; Gordon B. Spivack; David J. Stern;
Averill M. Williams.

²⁷ A minority of the committee would suggest the following additional procedure if Congress decides to provide for immediate Supreme Court review: Within 15 days after entry of judgment, either party to the Government antitrust suit may file with the Supreme Court an application for immediate review, with the other side having 15 days to oppose. The application could then be decided within the time normally allowed for appeal. These members of the committee believe that if there are truly extraordinary circumstances justifying immediate appeal to the Supreme Court, they can certainly be articulated in 15 days. Moreover, one member believes that in bank merger or consolidation cases, where the Government obtains an automatic injunction or a statutory stay of consummation upon the filing of its complaint (12 U.S.C. §§ 1828(c)(7), 1849(b)), both parties should have automatic expedited appeal.

Mr. GREGORICH. Yes. I would like to briefly comment on the report. The report is of an official nature in the sense that it is a committee job and, as you gentlemen are well familiar, what emerges from a committee is not always a racehorse. It is sometimes something of a camel.

In general, of course, the drafting committee which I headed up agrees with the conclusions of the report. There are some sections of the bill that I, personally, was more favorable toward than emerged as a result of the committee vote.

Let me start by introducing myself. My name is Gregory Gregorich. The name gave a little bit of trouble earlier.

Senator TUNNEY. I am sorry.

Mr. GREGORICH. I am a member of the bar of the State of New York, and I am associated with the firm of Rogers, Hoge & Hills in New York City.

Most of my work is in antitrust law and trade regulation.

As Professor Goldschmid told you, the Committee on Trade Regulation of the Association of the Bar of the City of New York, of which I am a member and which I will refer to as our committee, to distinguish it from any other committee, prepared a report on your bill which I was happy to find out arrived in time, even though it was mailed a few days ago.

I believe that the rather spirited debate in our own committee is a foretaste of the spirited debate that you gentlemen will face in the future on the bill.

In large measure, our committee consists of antitrust practitioners, and, is their wont, they bring their own experience to these debates.

What emerged was a kind of split among generations, a philosophical split, which I am sure, in the course of the congressional debate, you will find in perhaps somewhat more refined form.

I would first like to address myself to the disclosure of lobbying provision, which is section 2(f).

May I say that there was total unanimity in our committee on that point. We all agreed that it should be enacted into law as written.

I believe that I accurately reflect the sense of the committee when I say that we strongly feel that lobbying contacts which directly or impliedly concern the content of a proposed consent decree by officers, directors, or representatives of defendants in the middle of a Government antitrust action should be disclosed, if not restricted.

In a litigated situation it is, of course, very important to insure that counsel for defendants may fully and freely negotiate with their governmental counterparts.

I believe we are all familiar with and enjoy the tough negotiations that ensue and that characterize such proceedings. Counsel for both parties in Government antitrust actions want to be able to drive a hard bargain fairly, without fear of prejudicial publicity to their client. I think this is necessary, and I think it is a rational and sensible provision.

These considerations—namely, confidentiality of communication between counsel of record on the one side and governmental attorneys on the other—do not apply, in our view, to a situation where officials of powerful business entities have apparently clandestine meetings with equally powerful decisionmakers on the Government side.

When such contacts are subsequently revealed in the press, we believe, a climate is created which certainly looks like apparent impropriety. And whether or not impropriety has taken place is another matter, but I think it is important, from the standpoint of respect for governmental processes and for the legal process in general, that such contacts be, at the very least, disclosed if not avoided.

As to penalties, Professor Goldschmid has told you that we agreed, as a committee, in total, that the penalties should be increased.

In our report we refer to a recent nonantitrust case which illustrates that one ought not to be shocked at the sums of money that are—would be available in event of passage of this bill to the district judge, as a fine or penalty to assess.

I think that it is important, particularly in the antitrust context, where there are so many huge public and particularly, of course, private entities, corporations, that there be deterrence of conduct which is undesirable.

It is a truism that many of the sizable corporations can merely shrug off a penalty of \$50,000.

Now, this is not to say that deterrence is the only element that will keep corporate conduct on a basis that we find desirable. But I think for people who would possibly be tempted to commit a violation, deterrence is a good thing to know about.

In that connection, the case that we refer to (as reported in the New York Times) was a civil action brought against Ford Motor Co. in Detroit, which was settled for a grand total of \$7 million in fines.

I think that in that case we may assume—incidentally, the violation was one of the EPA, not, of course, of the antitrust laws. But I think we may assume that, whatever other steps may have been taken inside that company to insure that recurrence of similar actions will not take place in the future, one of the real deterrents is the fact that \$7 million was paid out, or is about to be paid out.

As Professor Goldschmid pointed out to you, our committee had its liveliest discussion, most prolonged and most vigorous, on the consent decree provisions.

I think that the split was one based on large measure on philosophy. Our committee by a close majority concluded that we favor the provisions of the bill requiring the Government to file the public impact statement.

I was a part of that slim majority.

We believe that such a statement would have the salutary effect of focusing the Government attorneys on public interest issues. It is sometimes easy to lose track of the general or of the broad picture in the middle of a litigation, and I am sure this happens on both sides—both when one is a member of the private bar or when one litigates for the Government.

It is good to have to step away in the heat of combat and to appraise the consent decree or to attempt to appraise the consent decree with a little bit of perspective.

In that connection, it is well to keep in mind the original purpose of Congress in enacting section 5 of the Clayton Act, back in 1914. Parenthetically, section 5 has remained largely unchanged, even though it was amended in part in 1955.

A concise source of the legislative background of that section is found in the case of Minnesota Mining & Manufacturing Co. against New Jersey Wood Finishing Co., a 1965 Supreme Court case reported at 318 U.S.

There is a very scholarly appendix by Justice Black—who dissented, incidentally—and it summarizes and describes the congressional debates that took place prior to the passage of the original act.

It is clear to us, as it has been to a number of courts subsequently, that while the obvious purpose and function of the proviso of section 5(a) of the Clayton Act was and is to encourage capitulation by the "trusts," thereby saving the Government a lot of money and litigation time, the primary purpose of the main body of section 5 is to facilitate and expedite private action.

The objectives of section 5(a) are therefore: First, to encourage private self-interest as a means of antitrust enforcement; and, second, to ease the staggering financial burden of litigation by private litigants injured by antitrust violations.

It is clear that it was legislation specifically designed to ease the burden of private parties in litigating on the basis of antitrust violations and harm done to them and to shorten the process of adducing proof.

As it was well stated, for example, in General Electric Co. against City of San Antonio—it is a fifth circuit case, 1964, reported at 334 Fed. 2d—the primary object of section 5(a) is to ease these staggering burdens on the private plaintiff.

Both purposes of section 5(a)—that is, of the main body—namely, shortening proof and easing the financial burden—and the purpose of the proviso of the section serve the broad objectives of antitrust enforcement.

Now, there is an apparent dichotomy which may be projected into the future and which I think Congress will have to deal with.

The dichotomy is this: That section 5(a) encourages private plaintiffs, but if you encourage private plaintiffs too much, you may, to a considerable extent, weaken and infringe upon the effectiveness of the consent decree as an enforcement tool.

I would suggest, therefore, that this dichotomy is sometimes not easy to harmonize. In any proposed amendment to section 5, the question of where the balance should be struck between the principal legislative purpose of the main body of the section as contrasted with the purpose of its proviso is a matter of political judgment.

In our committee—though we like the committee and each other—we hesitate to hold out our political judgment as particularly instructive.

But we are clear about one point: namely, that if sections 2 (d) and (e) of S. 782 were enacted into law, some Government antitrust cases, which would otherwise be settled by consent decrees, would not be settled, but would perforce march laboriously and expensively to trial.

I believe Senator Gurney recognized this in his statement.

Now, how many cases would not be settled and how many cases would therefore march to trial, I do not know. Perhaps the Department of Justice could shed a little light on that.

Section 2(d) of the bill would require the district judge, prior to entry of a consent judgment, to determine that the entry of judgment is in the public interest. And in that determination he must consider the public impact, provisions for enforcement and modification and adequacy, together with impact of entry on individuals alleging specific injury who are not parties to the action.

Perhaps this is the point where the philosophical split occurs.

I think that the more traditional antitrust barristers feel that, on the whole, private plaintiffs should find their own means of redress. They should find their own attorneys, and the Government should not lean over backwards too far in the effort to assist them in formulating the issues and in taking them by the hand and saying: "Here, if you wish to sue, here is your cause of action and here is the proof and here is the springboard for private suit."

On the whole, this may be viewed as a possible deterrent to the consent decree as an effective enforcement tool. I do not so view it. I report to you, however, that a fair half of the committee, of our committee, felt that it would deter consent decrees.

Sections 2 (d) and (e)——

Senator GURNEY. Because it would give the prospective plaintiffs some advice and suggestions they might not have; is that the feeling of the minority in the committee?

Mr. GREGORICH. I believe, Senator, that the principal objection was not so much the degree of aid to the plaintiff, but the deterrent effect it might have on the corporation which would otherwise settle. The corporation would, through its principal spokesmen, think basically, as follows: "If we cannot settle it cleanly and quickly, let us not settle at all."

In many situations, the situation is appraised as being roughly 50-50 in terms of estimated success of—estimated chance of success or failure at trial.

If a settlement can speedily be negotiated and the matter can be disposed of by the corporation, then the corporation would sign a consent decree, even though it feels deep in its heart that it has done no wrong.

If, however, for example, a mini-trial takes place on the issue of adequacy of the consent decree and if all these issues are aired as though considerable substance existed of proof of violation, then I think I join some of my colleagues in saying that many corporations would say, "Let us not settle. Let us not sign the consent decree."

Senator GURNEY. As a practical matter, though, in the southern district of New York, how long does it take before—well, from the filing of the suit until its final completion, if it continues on to trial?

Mr. GREGORICH. Is the question directed to antitrust suits?

Senator GURNEY. Yes.

Mr. GREGORICH. I can only give you an educated guess, Senator, because it varies, of course, so much and I have never seen precise statistics.

But it certainly is fair to say that a period measured between 3 and 7 years is not outrageous.

Senator GURNEY. Well, that is why I asked the question. I used to practice law in New York a long time ago, and it was not too speedy then. It has not improved any.

So I am saying that I really do not think that that is a viable argument of the minority opinion, because it does take a long time; and whatever longer period is required in here really is a comparatively short time compared with the time it takes to try an antitrust suit.

Of course, it may be different in some other jurisdictions.

Dr. GOLDSCHMID. Senator, may I add a word on that?

I think the fear of the minority really can be summarized as follows: One reason often compelling or aiding the signing of a consent decree is the wish of the defendant to avoid publicity, bad publicity, and to some degree to avoid legal fees.

Opening up the proceeding was thought to be of some deterrent effect in terms of signing the consent decree.

My own view is that it would be very small indeed, as to the extent of the proceedings, the amount of money involved, the time situation—it would be a small deterrent.

My own view is that this provision would not, in any way, inhibit the signing of a consent decree—or in any meaningful way, perhaps, is the best way of putting it.

Senator GURNEY. Thank you.

Mr. GREGORICH. I will briefly finish up by saying that the reason why we favor the repeal of the Expediting Act is that we believe it has served its function and purpose. There is now no reason to look only to the Supreme Court as the fountainhead of antitrust doctrine.

Antitrust doctrine is ably forged and fashioned in the courts below and in the Federal Trade Commission.

I do not believe that there is any reason to single out antitrust cases as those important cases which enjoy, along with a few others, the right of direct appeal.

We have set forth the reasons in full in our report, and I will be glad to answer questions, of course.

Senator TUNNEY. Thank you very much.

I was interested in your statement where you note the minority objection to the public impact statement. I was particularly interested in objections in (b) and (c).

With respect to the objection listed as (b), it is claimed that:

The requirement for disclosure of "unusual circumstances" will narrow the Government's discretion in settling suits improvidently commenced.

I have heard that argument before, and it seems to me the fairness in consent decrees or in the investigative and litigative function of the Department of Justice is a must. If the Department has made a mistake, it seems to me that they ought to be prepared to say they made a mistake, rather than issue some phony consent decree.

I would like to have your thoughts on that.

Dr. GOLDSCHMID. I think there were two different fears, in a way competing fears, there. One is that, if the Department had filed a complaint that demanded much too much, and that was public record, that this would make it difficult for the Justice Department or any group of attorneys to back away.

That was one set of fears in terms of possible settlement. Again, I think it is real, possible, not of enough magnitude to count very much.

The second matter that I think was being considered is one that I have particular trouble with. This is the case in which public factors—employment in the area in the small antitrust case, other non-antitrust considerations, equitable considerations perhaps—sometimes influence the decision of a case.

Numbers of people on the committee think those are proper to take into account. I myself have some doubts. Their fear was that this would basically preclude taking matters like that into account.

I am not at all sure that is true. The Justice Department, if it has such a case and wants to go off on such a factor, I think they can present their case in the district court.

Mr. GREGORICH. I wish to add to the response, our collective response to your question, Senator, only this: That I believe that the impact statement will have another salutary effect which we may not have recorded in writing in here; namely, that it may cause a little bit more thinking before the bringing of an action at all.

Sometimes youthful vigor may mislead an occasional government attorney, just as it does an attorney on the other side of the fence.

Perhaps if an attorney knows that he is going to have to prepare a public impact statement at some future point, and explain why, after requesting the world, he had to settle for considerably less, it may lead him not to bring that case in the future or a similar case in the future.

Senator TUNNEY. I think that is a good point.

The objection listed in (c) is that such a filing would discourage defendants from entering into consent judgments. Again, this is an argument that I have heard, and which I quite frankly fail to understand.

It seems to me that nothing in this bill will create any more trouble, damage, liability. Presumably the defendant might complain about having a vivid description of his illegal practices spread upon the record, but, at the same time, this might be less painful than going through a full trial.

He would still find the consent decree an attractive solution to this problem.

Could you just comment on this?

Mr. GREGORICH. Yes, Senator, I preface this by saying that I may not do entire justice to these objections, because I was, after all, in favor of the provision that I am now explaining the objections to.

The feeling of some of my very respected and very intelligent fellow practitioners was that, as a matter of philosophy, the courts step in only when there is a case or controversy.

Similarly, the Government ought not to undertake too much in the way of stirring up litigation. After all, if one follows out the public impact statement and the procedures under it to their logical conclusion, what will happen in many instances is that otherwise dormant plaintiffs will now stir to life. That is, after all, one of the purposes of it.

Knowing this—that the consent decree procedure itself may not terminate the legal problems that the company finds itself in—the company may simply say, “Well, there is no incentive for settlement, and we will not sign a consent decree.”

That was, as I recall, the thrust of their feeling on the subject.

Senator TUNNEY. I am sure we will get some more opinions on that particular point.

Professor?

Dr. GOLDSCHMID. I might just add an answer to the objection made by members of the committee. Of course, the answer is that almost all practitioners today, particularly in our large cities, know very well the redress and impact.

This becomes almost a "fairness to the consumers" kind of provision. For those lawyers and those companies that do not completely understand the impact of Government's action, it simply opens it up to them.

I do not think it is a matter of great moment. It is simply a matter of fairness and good sense.

Senator TUNNEY. That is the reason it was put in the bill.

I am interested in the objections. I perhaps can be convinced that there is an argument for removing that language, but I must say at the moment I do not think I would be convinced, from what I have heard so far.

I am somewhat concerned with your conclusions that sections 2 (d) and (e) of the bill should be deleted from legislation.

It is very important to me that the court not act as a rubber stamp, that it make an independent evaluation, as it does in other kinds of cases.

Do you think that perhaps the language such as contained in section 2(d)—that section which requires the court to make certain determinations—might be retained, while the language in 2(c) might be eliminated?

The language in 2(e) lists a series of options for the court. It perhaps is a little bit officious to list the options to a judge of superior intellect.

I would just like to have your comments on that.

Dr. GOLDSCHMID. I suppose my view fundamentally is that I fully agree about the need for scrutiny in appropriate circumstances.

There is no doubt, no question, I think no dispute in my mind about that.

The question is how to get that scrutiny, what standards should be used? The fear is really the one that I indicated, that the wording, this new wording with relatively little legislative history, may open up too much.

A judge today has broad discretion to look at that consent decree, the cases set out varying standards, most of which encompass the kinds of factors you list.

The question really is: Should we put these into legislation, as opposed to a case-by-case analysis?

The scrutiny, I think, will be mandated to a great extent not by the new standards, but by the filing of the impact statement, the availability of that statement to third parties and the court.

The court will now have the tools to look hard at the consent decree in appropriate circumstances.

The fear is merely with the form, with the wording: that this new wording may open up more than it should. It would lend itself to the kinds of interpretation that did come with the consent decree in the

ITT proceeding—considerations that I think are too far from the goals of antitrust, and too far from the goals of sound antitrust policy and public policy.

Senator TUNNEY. Mr. Gregorich?

Mr. GREGORICH. Senator, I would add that there is, perhaps, more meat to an objection if one refers to Senate bill 1088.

Now, as Professor Goldschmid said, there was no time for committee action on that. But we did both read it, and I can weave it in, but I have to state to you this is my own personal view, not the view of the committee.

With respect to Senate bill 1088, I would say that I would personally be in favor of section (a) (1) (A) and the continuation which is (B) and (C). But I would be opposed to all the other portions thereof, in particular because they would make for delay.

The latter provisions of that bill, I think, more clearly go in the direction that some of the objectors to our report had in mind.

The fact, for example, that the person who has made a successful comment can then come into court and ask the court to give him the fair and reasonable value of his attorney's time in preparing the comment, which then the defendant presumably pays in one form or another.

The fact that the publicity is paid for equally—in equal parts by the United States and by the defendant.

It seems to me that if a settlement starts off with the premise that we will not examine the merits of the controversy and a settlement is indicated and it is fair and equitable then the defendant should not also bear the cost of publicity in journals of great circulation in at least one or two or three or more districts across the Nation.

It is this sort of thing that I think we would all object to, and, indeed, it would, I think, distort the very good purposes and functions of a bill such as your own.

Senator TUNNEY. Yes.

Dr. GOLDSCHMID. Senator, may I add one thing?

If section 2(e) is eliminated, you still should retain the thrust of section (g), section 2(g) of the bill.

That would allow—it would clear up the one thing that the District Court might have problems with; and that is the taking of testimony.

The impact here would be to avoid any kind of consent decree having prima facie impact. That, in effect, would of course deter settlement.

Therefore, we would keep the thrust of (g), and we really think that the Court already can do everything indicated in (e).

Senator TUNNEY. In (d) and (e)?

Dr. GOLDSCHMID. Right.

Senator TUNNEY. Well, of course, one of the things is that (d) might help insure that the court would pay close attention to the proposed public impact statement.

But your feeling is that the court does not need that prod.

Dr. GOLDSCHMID. I guess that is right, Senator. The district judge, a conscientious district judge, now with the impact statement on controversial cases, with the help of third parties and others, would be able to use that statement.

And here, I think, the development of the law, I suppose what I am saying is that it would be better on a case-by-case basis.

Senator TUNNEY. And you think that the habit of mind that presently exists amongst district court judges is to rubberstamp the consent decree?

Dr. GOLDSCHMID. Of course, the district judges who have complained in the past about consent decrees have generally pointed to the lack of availability of any information, of the ability to understand what was happening.

Of course, the parties—the Assistant Attorney General in the case, the defendants—are supporting the settlement.

Here, for the first time, the court will have a clear statement from the Government of the reasons and rationale will have that available to third parties to intervene as amicus, and will have the other tools.

We think that that, in itself, should change the basic philosophy and state of mind of the district judge.

I might add one point, of course, that I think you recognize and we all should; that of, say, the 80 percent of cases that are settled by consent decrees, either hearings or extensive briefs or anything like that should occur in very few cases.

The hope is that this bill will provide a check on the case that has gone wrong; that this would not become a time consuming proceeding for district judges, the Attorney General, or the Antitrust Division in general.

Senator TUNNEY. In your statement, you say that the “enumeration provided in the bill may, indeed, be read—contrary to Senator Tunney’s intention—as a limitation upon a district court’s discretion.”

Now, do you feel that that applies to 2(e) exclusively, or does it also apply to 2(d) as well as 2(e)?

Mr. GREGORICH. The comment was intended to apply to 2(e) only, as if to say that, when you enumerate apples, oranges, pears and grapes, that conceivably you might be led to believe that when you say “all other food,” that what you mean is additional fruit, if you see what I mean, additional items in the same category, but not totally different methods that might be at the disposal of the District judge in his discretion.

Dr. GOLDSCHMID. As I have indicated, my fear is 2(d) may open up too much.

Senator TUNNEY. Right. Well, the consent decree provisions of the bill of S. 782 have been proposed by some as potentially too burdensome to the Antitrust Division.

Do either of you gentlemen care to comment on that?

Mr. GREGORICH. Well, I would say this—of course, I have no experience inside of any government body in terms of professional practice.

But it is my preliminary appraisal that it would not. I believe that it would cultivate appropriate attitudes on the part of Government attorneys, but I do not believe that when they sit down to write an impact statement they are going to be faced by any more burden than would be required if they had to write a short brief in support of the recommendation that the court approve the settlement.

Dr. GOLDSCHMID. Indeed, they often do write such briefs now. It is general policy to do so.

It is very doubtful this would create much of a burden. Much of the material, of course, comes out of the complaint itself.

And we hope, as I have indicated, that this would come up—that there would be a real controversy in very few cases. I cannot imagine that this would be a substantial burden.

Senator TUNNEY. Well, I would like to compliment you on the procedures that you suggest with regard to revising the Expediting Act. It is very interesting, and I am going to review it in detail with Senator Gurney and other members of the committee and the staff.

I would like to ask you a question regarding these suggestions. You recommended the deletion of section 5(b)(2), which gives the Attorney General the sole discretion to mandate appeal through the Supreme Court.

Such a change clearly would allow neither party to mandate appeals to the Supreme Court, although the court *sua sponte* could mandate such an appeal.

Would it be appropriate, rather than deleting it, this right for the Attorney General, to provide for both the defendant, as well as the Attorney General?

Dr. GOLDSCHMID. Well, of course, the evenhandedness approach here is the one that the committee was most concerned about.

The tension in doing such a thing, I think, would be the problem of the Supreme Court's docket—the Freund committee report, other things, of course, are before the Senate and have to be considered here.

The Justices complain time and again about the burdens of this kind of review. Much of the most innovative work in the field now comes from the private bar in terms of plaintiff actions or FTC action.

There seems to be little reason to force the Supreme Court to take cases it does not want and on which it does not have the aid of the courts of appeals.

Forcing it on the court also often leads to very summary affirmations or reversals without the court even hearing the cases; it just goes off on the jurisdictional briefs.

There seems no reason to force the Supreme Court—and, indeed, it is not really visible to force the Supreme Court—to take cases it does not think are important enough to reach it.

The screening by the district judge, we think, would make sense. If the district judge thinks the case is important enough to go up, it would seem to make some sense to at least allow that, although, as I have indicated, the major thrust of the committee's report is to eliminate the Expediting Act entirely.

Mr. CHUMBRIS. Mr. Chairman, may I interject on this?

Senator TUNNEY. Certainly.

Mr. CHUMBRIS. Are you aware of the action taken by this subcommittee in the 91st Congress when the Senate passed its version of the Expediting Act and the House passed its version of the Expediting Act, the differences being on the method of moving directly to the Supreme Court.

The House and the Senate could not work out those differences, and the bill died in the 91st Congress.

Dr. GOLDSCHMID. I was not aware of that.

Mr. CHUMBRIS. Yes, it did.

Now, did your committee show any preference for either the House version or the Senate version of the bill?

Dr. GOLDSCHMID. No, I am afraid we did not consider those. Our basic view, as I say, is that the Expediting Act itself today plays no useful purpose and should be eliminated.

The basic thrust of the criticisms of the present bill is that it should be even-handed. I think the even-handedness argument goes toward allowing appeal only if sua sponte by, or on petition to, the district judge.

If you would tell me the dispute between the two Houses, I would be glad to comment upon it.

Mr. CHUMBRIS. Mr. Chairman, so that the record will be clear on this point, may we place, at the completion of these gentlemen's testimony, the report of the Senate committee on the bill and the report of the House committee, which will set forth clearly what their respective positions were and why they could not come together? Otherwise that bill would have been law at this time.

Senator TUNNEY. Certainly.

[The document follows. Testimony resumes on p. 50.]

Calendar No. 1225

91ST CONGRESS }
2d Session }

SENATE

{ REPORT
No. 91-1214

AMENDING EXPEDITING ACT

SEPTEMBER 21, 1970.—Ordered to be printed

Mr. ERVIN, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 12807]

The Committee on the Judiciary, to which was referred the bill (H.R. 12807) to amend the act of February 11, 1903, commonly known as the Expediting Act, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

On page 3, line 11, after the word "of" strike all down to and including the word "justice" on line 19 and insert in lieu thereof "justice."

On page 3, lines 20 and 21, strike "or (3) or a certificate pursuant to (2)".

PURPOSE OF THE AMENDMENTS

The purpose of the amendments is to provide that appeal from a final judgment in a civil antitrust action brought by the United States shall lie directly to the Supreme Court on a finding that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice by order of the district judge upon application of a party.

PURPOSE

The purpose of the proposed legislation, as amended, is to amend the Expediting Act so as to require that final judgments and interlocutory orders in certain civil antitrust cases if appealed, be heard by the circuit courts of appeals.

The bill would amend section 1 of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) providing for a three district judge court in civil actions wherein the United States is the plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, upon the filing by the Attorney General with the district court of a certificate that the cases are of general public importance. The proposal would eliminate the provision that a three judge court be impaneled. It would however retain the expediting procedure in single judge district courts.

The proposal would amend section 2 of the Expediting Act (15 U.S.C. 29, 49 U.S.C. 45), providing that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section 1 of the Expediting Act will lie only in the Supreme Court. Under the proposal only those cases of general public importance would be appealable directly to the Supreme Court and normal appellate review through the courts of appeals with discretionary review by the Supreme Court would be substituted therefor. An appeal shall lie directly to the Supreme Court on a finding that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice by order of the district judge upon application of a party. The proposal also would eliminate the reference in existing law to expedition of civil cases brought by the United States under the original Interstate Commerce Act and subsequent statutes of like purpose.

STATEMENT

The Expediting Act became law in 1903, a time when the Sherman Act was relatively new and an untried method of restraining combinations and trusts. There was apprehension that the newly created system of courts of appeals, because of their supposed unfamiliarity with the new law and because of the additional time required by their procedures, would delay and frustrate the efforts to control monopolies. Responding to that concern the Attorney General recommended the expediting legislation and it became law after Congress approved it without debate.

One of the principal arguments offered in support of the proposal is to relieve the Supreme Court of the burden of hearing the numerous cases coming to it under the Expediting Act. Many civil antitrust cases require the Supreme Court to read thousands of pages of transcript from the district court. A question arises as to the adequacy of the review the Supreme Court can give to those cases in which there are voluminous trial records. Almost all the present Justices have, both in and out of Court, asked that these cases go first to the court of appeals. Some of the Justices are of the opinion that adherence to the customary appellate procedure would benefit the Supreme Court by reducing the numbers of matters presented to it. Further, having the initial appellate review in the courts of appeals would be of benefit to the litigants by refining the issues presented to the Supreme Court and also give litigants an opportunity of review of the district court decrees which are seldom reviewed by the Supreme Court under existing practice.

It is generally conceded that the existing law has permitted more expeditious determinations of civil antitrust cases but the factual situation prevalent when the law was enacted no longer obtains: dilatory practices, such as protracted delays in filing appeals, are not now available. Additionally, by permitting appellate review of preliminary injunctions more expeditious treatment of merger cases should obtain since the trial court's decision would be subject to an immediate review prior to a full-blown trial on all the issues.

The committee is of the opinion that the proposed legislation provides a suitable means of meeting the problems arising from the Expediting Act and would assure that the interest of all parties would be protected. Accordingly the committee recommends favorable consideration of H.R. 12807 with amendments.

Attached hereto and made a part hereof are the views of the Department of Justice:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C.

The VICE PRESIDENT,
U.S. Senate, Washington, D.C.

DEAR MR. VICE PRESIDENT: There is enclosed a proposed bill to amend the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 28 and 29, 49 U.S.C. 44 and 45.

The bill would streamline judicial procedure in antitrust litigation and institute procedure for appellate review of interlocutory orders on injunctions.

The bill would amend section 1 of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) which provides for a three-judge district court in civil actions where the United States is a plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, when the Attorney General files with the district court a certificate that the case is of general public importance. The section also provides that the hearing and determination of such cases shall be expedited. The amendment would eliminate the provision that a three-judge court be impaneled when the Attorney General files his expediting certificate, but would retain the expediting procedure in single-judge district courts.

The bill would amend section 2 of the act (15 U.S.C. 29, 49 U.S.C. 45), which provides that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section 1 of the Expediting Act will lie only in the Supreme Court. The amendment would eliminate direct appeal to the Supreme Court in such actions for all but cases of general public importance, substituting normal appellate review through the courts of appeals with discretionary review by the Supreme Court. The amendment provides that any appeal from a final judgment in a Government civil case under the antitrust laws, or other statutes of like purpose, and not certificated by the Attorney General or the district court as requiring immediate Supreme Court review, will be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to section 1292(a)(1) and 2107 of title 28 of the United States Code, but not otherwise. Any judgments entered by the courts of appeals in such

actions shall be subject to review by the Supreme Court upon a writ of certiorari.

The amendment also provides that an appeal and any cross-appeal from a final judgment in such proceedings will lie directly in the Supreme Court if, not later than 15 days after the filing of a notice of appeal, (1) upon application of a party, the district judge who decided the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice, or (2) the Attorney General files in the district court a certificate containing the same statement. Upon filing of such an order or certificate, the Supreme Court shall either dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law or deny the direct appeal and remand the case to the court of appeals. Review in that court could then go forward without further delay. This is similar to the procedure of the Criminal Appeals Act (18 U.S.C. 3731).

It is desirable, however, that the possibility of immediate review by the Supreme Court be preserved for cases of general public importance in the administration of justice. Such cases will usually involve novel legal questions pertaining to the interpretation or enforcement of the antitrust laws or may have serious legal or economic consequences going beyond the mere private interests of the individual litigants.

The determination of whether a case should be certified directly to the Supreme Court can best be made by the Attorney General or the trial judge who decided the case. It is the public interest in effective antitrust enforcement which primarily dictates the need for any direct appeals, and it is the Attorney General—the chief law officer of the United States—who is in the best position to determine what the total enforcement picture is with respect to a particular case. Though defendants' private interests, which may be of substantial private importance, would not afford a basis for direct appeal to the Supreme Court, the trial judge who heard and decided the case can best evaluate a defendant's claim that immediate Supreme Court review is of general public importance in the administration of justice.

The bill's provisions requiring the Attorney General or the district judge to file the certificate within 15 days after either party has filed its notice of appeal will assure that the opposing party is promptly notified that a direct appeal is involved. And the routing of both appeals and cross-appeals to the Supreme Court by the filing of the certificate will eliminate the delay and confusion of piecemeal appeals.

There is presently considerable uncertainty as to whether the interlocutory appeal statute, 28 U.S.C. 1292(a), is available in cases falling within the Expediting Act. The circuits of the courts of appeals are split on this question (compare *United States v. Ingersoll Rand*, 320 F. 2d 509 (3d Cir. 1963), with *United States v. F.M.C. Corp.*, 321 F. 2d 534 (9th Cir.), application for temporary injunction denied, 84 S. Ct. 4 (1963) (Goldberg, J., in chambers), and *United States v. Cities Service Co.*, No. 7216 (1st Cir., May 8, 1969)), and we think it appropriate to resolve this question with clarifying legislation.

We strongly believe in the desirability of appellate review of district court orders granting, modifying, or denying preliminary injunctions. Such review is generally limited to the outset of a case and would not cause undue delay or disruption. This district court's discretion on

injunctions can be reviewed, in substantial part, separately from a determination of the ultimate merits of the case and court of appeals review is not, therefore inconsistent with subsequent direct Supreme Court review of the final judgment in the event of certification. Moreover, the immediate impact of injunctive orders, whether the injunction is granted or denied, calls for appellate review as a matter of fairness. The public interest that possibly unlawful mergers not be consummated until their validity is adjudicated, in addition to the obvious desire of private business to avoid a costly and complicated unscrambling, would, in our view, benefit from making the provisions of 28 U.S.C. 1292(a)(1) available in Expediting Act cases.

These considerations do not apply to appeals of interlocutory orders not relating to injunctions pursuant to 28 U.S.C. 1292(b). That section permits interlocutory appeal of any order made at any time during the district court proceedings, to which that court appends the statutory findings (although the court of appeals may, in its discretion, decline to allow the appeal). One reason against applicability of section 1292(b) is the desire to avoid undue delay and disruption. Antitrust cases are often lengthy and complex, containing sufficient obstacles to expeditious conclusion without increasing the possibilities of interruption for interlocutory appeals. A second reason is the inappropriateness of review of controlling questions of law by a court which later may never get review of the final judgment. The theory of 1292(b) is that the appellate court should have an opportunity to rule early, before getting the final judgment, on questions that may be decisive. It would be anomalous for the courts of appeals to undertake interlocutory resolution of such issues when, at the end of trial, if a certificate is filed, the final judgment would go directly to the Supreme Court.

Finally, we think no useful purpose is served by retaining enforcement proceedings under the Interstate Commerce Act or the Communications Act within the scope of the Expediting Act. The Interstate Commerce Act is expressly included in section 1 of the Expediting Act, while section 401(d) of the Communications Act (47 U.S.C. 401(d)) makes the Expediting Act applicable to cases brought by the United States under sections 201-222 of the Communications Act. We see no need for direct appeal in such cases—indeed, these provisions have rarely been invoked. Therefore we propose that references to the Interstate Commerce Act be stricken from the Expediting Act and that section 401(d) of title 27 be repealed.

The Bureau of the Budget advises that there is no objection to the presentation of this proposed bill from the standpoint of the administration's program.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

That section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, [“an Act to regulate commerce,” approved February 4, 1887,] or any other Acts having like purpose that *have been or hereafter may be enacted*, wherein the United States is plaintiff *and equitable relief is sought*, the Attorney General may file with the [clerk of such] court, *prior to the entry of final judgment*, a certificate that, in his opinion, the case is of general public importance. [, a copy of which shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge) of the circuit in which the case is pending.] Upon [receipt of the copy] *filing* of such certificate, it shall be the duty of the [chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof.] *judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.*"

SEC. 2. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

[In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from—the final judgment of the district court will lie only to the Supreme Court.]

“(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled ‘An Act to protect trade and commerce against unlawful restraints and monopolies,’ approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

“(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if:

(1) upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by

the Supreme Court is of general public importance in the administration of justice:

~~(2) the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.~~

A court order pursuant to (1) or a certificate pursuant to (2) must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross-appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross-appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

SEC. 3. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) The proviso in section 3 of the Act of February 9, 1903, as amended (32 Stat. 848, 849; U.S.C. 49 43), is repealed and the colon prededing it is changed to a period.

SEC. 4. The amendment made by section 2 shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

EXPEDITING ACT AMENDMENTS

MAY 27, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. CELLER, from the Committee on Judiciary,
submitted the following

REPORT

[To accompany H.R. 12807]

The Committee on the Judiciary, to whom was referred the bill (H.R. 12807) to amend the act of February 11, 1903, commonly known as the Expediting Act, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

1. Page 3, line 17, change the period to a semicolon, add the word "or" and insert the following new paragraph:

(3) the district judge who adjudicated the case, *sua sponte*, enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

2. Page 3, line 18, after "(1)" add the phrase "or (3)".

PURPOSE OF THE AMENDMENTS

Amendment No. 1 provides that the district judge who adjudicated the case on his own motion may enter an order to have an appeal from a final judgment referred directly to the Supreme Court.

Amendment No. 2 is a perfecting amendment to give effect to amendment No. 1.

PURPOSE OF THE BILL

H.R. 12807 amends the Expediting Act (32 Stat. 823), as amended (15 U.S.C. 28 and 29, 49 U.S.C. 44 and 45). Section 1 of the bill eliminates the provision that requires that a three-judge court be impaneled when the Attorney General files an expediting certificate. The bill retains present law that requires the court to assign antitrust cases

for hearing at the earliest practicable date and to cause antitrust cases to be in every way expedited when the Attorney General files a certificate that, in his opinion, the case is of general public importance.

H.R. 12807 amends section 2 of the Expediting Act to eliminate mandatory direct appeal to the Supreme Court in antitrust actions brought by the United States in which equitable relief is sought, and establishes a procedure for such direct appeal to the Supreme Court in cases of general public importance. Appeals from final judgments in antitrust cases brought by the Government, in which equitable relief is sought, which are not certified as being of general public importance by the Attorney General, or by an order of the district court as provided in section 2 of the bill, shall be taken to the courts of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Interlocutory orders entered in such antitrust actions brought by the United States shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code. Judgments entered by the court of appeals pursuant to the procedures established in H.R. 12807 shall be subject to review by the Supreme Court upon a writ of certiorari.

H.R. 12807 provides that an appeal from a final judgment in a civil antitrust action brought by the United States shall lie directly to the Supreme Court on a finding that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice (1) by order of the district judge upon application of a party, (2) by order of a district judge on his own motion, or (3) when the Attorney General so certifies.

Applicability of the provisions of the Expediting Act to the proceedings under the Interstate Commerce Act of February 4, 1887, and the Communications Act of 1934 is eliminated.

STATEMENT

For a number of years the Expediting Act of 1903 has been the subject of criticism, and since 1949, a number of bills have been introduced to change the procedures required by the Expediting Act relative to appeals in antitrust cases brought by the United States for equitable relief.

The Expediting Act of 1903 was enacted in an effort to insure speedy disposition of important civil antitrust cases brought by the United States. The Act contains two basic provisions:

(1) *Three-judge district courts*

It empowers the Attorney General of the United States, if he certifies that, in his opinion, a Government civil antitrust suit or Government suit under the Interstate Commerce Act is of general public importance, to require the designation of a special three-judge Federal court to hear the case.

(2) *Direct appeals to Supreme Court*

Appeals from final judgments in all civil antitrust suits brought by the United States and Government suits under the Interstate Commerce Act lie only to the U.S. Supreme Court. In such cases the United States courts of appeals which normally review Federal district court decisions before Supreme Court consideration are bypassed.

In the early period of Sherman Act enforcement, if the Attorney General believed an antitrust case brought by the Government to be of general public importance, it was desirable that the case should be heard on an expedited basis by a specially designated court. The three-member court would have unusual prestige and would be able to deal more satisfactorily with emerging legal and economic issues that were novel and complex.

The provisions for a three-judge court, however, have rarely been invoked by the Government, presumably because of practical pressures to avoid waste of judicial manpower in the presence of already overcrowded dockets. In nearly 30 years, the Department of Justice utilized the three-judge court procedure in antitrust cases only seven times. In the last 10 years, only one antitrust case has been tried before a three-judge court.¹

Section 2 of the Expediting Act, providing for direct appeal from district court judgments to the Supreme Court has stimulated a great deal of criticism in Supreme Court opinions. In 1962, Mr. Justice Clark, concurring in the case of *Brown Shoe Co. v. United States*,² stated that:

* * * The Act declares that appeals in civil antitrust cases in which the United States is complainant lie only to this Court. It thus deprives the parties of an intermediate appeal and this Court of the benefit of consideration by a court of appeals. Under our system a party should be entitled to at least one appellate review, and since the sole opportunity in cases under the Expediting Act is in this Court we usually note jurisdiction.

In a 1963 decision, *United States v. Singer Mfg. Co.*,³ Mr. Justice Clark, writing for the Court, stated:

Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. . . . Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Court of Appeals.

In a separate opinion, Mr. Justice White expressed disagreement with this view.⁴

In April 1963, Attorney General Kennedy recommended amendment of the Expediting Act and proposed legislation to change the appellate procedure. In that year, the American Bar Association and the Judicial Conference of the United States also endorsed proposals for amendments.

In the 90th Congress, the Senate after hearings passed S. 2721. During the 90th Congress, however, the House of Representatives did not take action on S. 2721.

On July 14, 1969, Attorney General Mitchell, in an Executive Communication, recommended amendments to the Expediting Act.

¹ *United States v. Crocker-Anglo National Bank*, 222 F. Sup. 849 (N.D. Cal. 1963).

² 370 U.S. 294, 355 (1962).

³ 374 U.S. 174, 175 (1963).

⁴ *Ibid.*, at 197.

These recommendations are embodied in H.R. 12790 by Representative Emanuel Celler, chairman of the Committee on the Judiciary, and in H.R. 12807 by Representative McCulloch, for himself, Messrs. Gerald R. Ford, Anderson of Illinois, MacGregor, Hutchinson, McClory, Smith of New York, Meskill, Sandman, Railsback, Biester, Wiggins, Dennis, Fish, Taft, and Wylie.

The Attorney General in his July 14, 1969, communication stated:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 14, 1969.

The SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: There is enclosed a proposed bill to amend the Expediting Act (32 Stat. 823), as amended (15 U.S.C. 28 and 29, 49 U.S.C. 44 and 45).

The bill would streamline judicial procedure in antitrust litigation and institute procedure for appellate review of interlocutory orders on injunctions.

The bill would amend section 1 of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) which provides for a three-judge district court in civil actions where the United States is a plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, when the Attorney General files with the district court a certificate that the case is of general public importance. The section also provides that the hearing and determination of such cases shall be expedited. The amendment would eliminate the provision that a three-judge court be impaneled when the Attorney General files his expediting certificate, but would retain the expediting procedure in single judge district courts.

The bill would amend section 2 of the act (15 U.S.C. 29, 49 U.S.C. 45), which provides that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section 1 of the Expediting Act will lie only in the Supreme Court. The amendment would eliminate direct appeal to the Supreme Court in such actions for all but cases of general public importance, substituting normal appellate review through the courts of appeals with discretionary review by the Supreme Court. The amendment provides that any appeal from a final judgment in a Government civil case under the antitrust laws, or other statutes of like purpose, and not certificated by the Attorney General or the district court as requiring immediate Supreme Court review, will be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code, but not otherwise. Any judgments entered by the courts of appeals in such actions shall be subject to review by the Supreme Court upon a writ of certiorari.

The amendment also provides that an appeal and any cross-appeal from a final judgment in such proceedings will lie directly in the Supreme Court if, not later than 15 days after the filing of a notice of

appeal (1) upon application of a party the district judge who decided the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice, or (2) the Attorney General files in the district court a certificate containing the same statement. Upon filing of such an order or certificate, the Supreme Court shall either dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law or deny the direct appeal and remand the case to the court of appeals. Review in that court could then go forward without further delay. This is similar to the procedure of the Criminal Appeals Act (18 U.S.C. 3731).

The bill would also narrow the scope of the Expediting Act by eliminating the reference in existing law to civil cases brought by the United States under the original Interstate Commerce Act and subsequent statutes of like purpose. This change, however, would not alter the breadth of the Expediting Act insofar as the Government's injunctive antitrust cases are concerned.

In the early days of the Sherman Act it was desirable that, when the Attorney General believed an antitrust case brought by the Government would be of general public importance, he could have the case heard on an expedited basis by a specially designated court providing the advantage, in a relatively new area of law, of the wisdom and experience of three judges. Accordingly, the three-judge court provision in the Expediting Act was adopted in 1903, when trial judges and practitioners were encountering emerging legal and economic issues of novel complexity. However, the bench and bar's familiarity today with the antitrust laws obviates the need for three-judge courts. In nearly 30 years now the Department has resorted to the three-judge court procedure in antitrust cases but seven times, and only once during the last decade. Three-judge courts represent a substantial burden on our judicial resources and we see no adequate justification for continuation of the three-judge court provision in the law.

We believe that it is desirable to eliminate direct appeal to the Supreme Court for all but cases of general public importance and to substitute normal appellate review through the courts of appeals, with discretionary review by the Supreme Court. However, we also believe that upon the Attorney General's certification that an antitrust case, prior to final judgment, is of general public importance, the district court should expedite it, and if so certificated by the trial judge or the Attorney General within 15 days after any party has noted an appeal, the case should be routed directly to the Supreme Court.

On several recent occasions the Supreme Court has called attention to the unsatisfactory nature of the present procedure. See, e.g., *United States v. Singer Mfg. Co.*, 374 U.S. 174, 175, n. 1; *Brown Shoe Co. v. United States*, 370 U.S. 294, 355, 363-364 (Opinions of Clark and Harlan, JJ.); *United States v. duPont & Co.*, 366 U.S. 316, 324; cf. *Kennecott Copper Co. v. United States*, 381 U.S. 414 (Harlan and Goldberg, JJ., dissenting); but see *United States v. Singer Mfg. Co.*, *supra*, at 197 (Opinion of White, J.). Under present law the Supreme Court is called upon to review district court decisions in all Govern-

ment antitrust cases in which an appeal is taken, without regard to the general significance of the issues raised by the appeal. The Government can sometimes ameliorate this situation without undue sacrifice of enforcement aims by not appealing cases which it would be willing to carry to a court of appeals; but a defendant, of course, has a private interest which can be asserted only in the particular case and hence only by an appeal to the Supreme Court in the event that the district court rules against him. In most instances appeals by both defendants and the Government can initially be considered more effectively by the courts of appeals. Indeed, the availability of review by the courts of appeals would greatly ease the burden on the Supreme Court, which at present must often examine immense evidentiary records. The courts, defendants and the Government, therefore, will be better served by making review in the courts of appeals the normal rule.

It is desirable, however, that the possibility of immediate review by the Supreme Court be preserved for cases of general public importance in the administration of justice. Such cases will usually involve novel legal questions pertaining to the interpretation or enforcement of the antitrust laws or may have serious legal or economic consequences going beyond the mere private interests of the individual litigants.

The determination of whether a case should be certified direct y to the Supreme Court can best be made by the Attorney General or the trial judge who decided the case. It is the public interest in effective antitrust enforcement which primarily dictates the need for any direct appeals, and it is the Attorney General—the chief law officer of the United States—who is in the best position to determine what the total enforcement picture is with respect to a particular case. Though defendants' private interests, which may be of substantial private importance, would not afford a basis for direct appeal to the Supreme Court, the trial judge who heard and decided the case can best evaluate a defendant's claim that immediate Supreme Court review is of general public importance in the administration of justice.

The bill's provision requiring the Attorney General or the district judge to file the certificate within 15 days after either party has filed its notice of appeal will assure that the opposing party is promptly notified that a direct appeal is involved. And the routing of both appeals and cross-appeals to the Supreme Court by the filing of the certificate will eliminate the delay and confusion of piecemeal appeals.

There is presently considerable uncertainty as to whether the interlocutory appeal statute (28 U.S.C. 1292(a)), is available in cases falling within the Expediting Act. The circuits of the courts of appeals are split on this question (compare *United States v. Ingersoll Rand*, 320 F. 2d 509 (3d Cir. 1963), with *United States v. F.M.C. Corp.*, 321 F. 2d 534 (9th Cir.), application for temporary injunction denied, 84 S. Ct. 4 (1963) (Goldberg, J., in chambers), and *United States v. Cities Service Co.*, No. 7216 (1st Cir., May 8, 1969)), and we think it appropriate to resolve this question with clarifying legislation.

We strongly believe in the desirability of appellate review of district court orders granting, modifying, or denying preliminary injunctions.

Such review is generally limited to the outset of a case and would not cause undue delay or disruption. The district court's discretion on injunctions can be reviewed, in substantial part, separately from a determination of the ultimate merits of the case and court of appeals review is not, therefore, inconsistent with subsequent direct Supreme Court review of the final judgment in the event of certification. Moreover, the immediate impact of injunctive orders, whether the injunction is granted or denied, calls for appellate review as a matter of fairness. The public interest that possibly unlawful mergers not be consummated until their validity is adjudicated, in addition to the obvious desire of private business to avoid a costly and complicated unscrambling, would, in our view, benefit from making the provisions of section 1292(a)(1), title 28 of the United States Code, available in Expediting Act cases.

These considerations do not apply to appeals of interlocutory orders not relating to injunctions pursuant to section 1292 (b), title 28 of the United States Code. That section permits interlocutory appeal of any order made at any time during the district court proceedings, to which that court appends the statutory findings (although the court of appeals may, in its discretion, decline to allow the appeal). One reason against applicability of section 1292(b) is the desire to avoid undue delay and disruption. Antitrust cases are often lengthy and complex, containing sufficient obstacles to expeditious conclusion without increasing the possibilities of interruption for interlocutory appeals. A second reason is the inappropriateness of review of controlling questions of law by a court which later may never get review of the final judgment. The theory of 1292(b) is that the appellate court should have an opportunity to rule early, before getting the final judgment, on questions that may be decisive. It would be anomalous for the courts of appeals to undertake interlocutory resolution of such issues when, at the end of trial, if a certificate is filed, the final judgment would go directly to the Supreme Court.

Finally, we think no useful purpose is served by retaining enforcement proceedings under the Interstate Commerce Act or the Communications Act within the scope of the Expediting Act. The Interstate Commerce Act is expressly included in Section 1 of the Expediting Act, while section 401(d) of the Communications Act (47 U.S.C. 401(d)) makes the Expediting Act applicable to cases brought by the United States under Sections 201-222 of the Communications Act. We see no need for direct appeal in such cases—indeed, these provisions have rarely been invoked. Therefore we propose that references to the Interstate Commerce Act be stricken from the Expediting Act and that section 401(d) of title 27 be repealed.

The Bureau of the Budget advises that there is no objection to the presentation of this proposed bill from the standpoint of the Administration's program.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

On May 13, 1970, Assistant Attorney General Richard W. McLaren advised the House Antitrust Subcommittee that enactment of H.R. 12807 was desirable at this time to implement the Antitrust Division's program against mergers and acquisitions by conglomerate corporations. In this connection, Assistant Attorney General McLaren stated:

"It is generally recognized that it is much easier to keep two companies apart than it is to unscramble them. For this reason, the Government often seeks a preliminary injunction against a proposed merger; these injunction hearings sometimes assume the proportions of a trial on the merits, and the ruling of the district court is of vital concern to all the parties.

"However, there is at present considerable doubt that interlocutory appeals may be taken from the grant or denial of a preliminary injunction in Government civil antitrust cases. As a result, issues which might well be resolved promptly if an interlocutory appeal were available must await the conclusion of a frequently protracted proceeding.

"I might mention that in certain of our conglomerate merger cases, we believed that the records we had made entitled us to the issuance of a preliminary injunction, and if we had had a clear right to an interlocutory appeal, we very probably would have taken such appeals in these cases. As a general proposition, it is my personal opinion that such appeals might result in somewhat fuller hearing records, and final disposition of many of these types of cases.

"I think it is fair to mention that doubt about the availability of an appeal may also have some effect upon the outcome of some of these preliminary motions in the district courts. Defendants argue that if an injunction holds up their merger until the case is finally tried and disposed of, they will be forced to abandon their merger, and they are in effect really convicted without a trial and with no appeal. Since abandonment of the merger frequently would mean substantial lost profits for the stockholders of the acquired company,⁵ a trial judge can hardly help but be affected in some measure by this consideration. A right of appeal—which now exists incidentally for the general run of cases other than government civil antitrust cases, including private antitrust cases⁶—would remove this extra load from the shoulders of the trial judges.

"The administration has proposed legislation (S. 2612, H.R. 12807) to remedy various deficiencies in the Expediting Act, and to authorize appellate review of rulings granting or denying preliminary injunctions.

"We believe that the proposed amendment would not only be sound from the standpoint of better judicial administration, but fairer to the parties, and that it would increase the efficiency and effectiveness of our enforcement efforts.

"A clear and effective preliminary injunction procedure, including a right of appeal, will be especially needed if the merger wave again begins to accelerate. The tax bill has now become law, and stock market and money rates could turn around at any time. We know of no opposition to this proposed legislation, and we hope very much that it will be enacted soon."

⁵ *United States v. International Telephone & Telegraph Corp., et al.*, Memorandum of Decision After Evidentiary Hearing on Motions for Preliminary Injunctions (two cases), pp. 11-13 (mimeo op. Oct. 21, 1969) (D. Conn.).

⁶ See 28 U.S.C. § 1292(a)(1); *Allis-Chalmers Mfg. Co. v. White Consolidated Industries, Inc.*, 414 F. 2d 506 (3d Cir. 1969), cert. denied, 38 U.S.L.W. 3254 (U.S. Jan. 12, 1970).

COST TO THE UNITED STATES

This bill provides changes in appellate procedures. Where the court of appeals action is a final disposition there should be no additional expense. Where the Supreme Court grants a writ of certiorari to review a court of appeals decision, the Government expense will be increased. A precise estimate of such additional expense cannot be made at this time.

ANALYSIS

As amended, H.R. 12807, amends the Act of February 11, 1903, the Expediting Act, as amended, to conform appellate procedure in antitrust cases with the procedures that apply to other types of litigation, to institute a procedure for appellate review of interlocutory orders in antitrust cases in which equitable relief is sought, and to retain a procedure for direct appeal to the Supreme Court in appropriate cases of general public importance in the administration of justice. Section 1 provides that civil actions brought in U.S. district courts under the Sherman Act, or any other Acts having like purpose, where the United States is a plaintiff and equitable relief is sought shall be expedited in every way, on certification by the Attorney General, prior to final judgment, that the case is of general public importance.

Section 2(a) directs that in every civil action in a U.S. district court under the Sherman Act, in which the United States is the plaintiff and equitable relief is sought, appeal from a final judgment shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the U.S. Code. Appeal from an interlocutory order in such antitrust cases shall be taken to the court of appeals pursuant to sections 1292(a) (1) and 2107 of title 28 of the U.S. Code. Judgments of the court of appeals in any such antitrust actions shall be subject to the review by the Supreme Court upon a writ of certiorari.

Subsection 2(b) authorizes an appeal in an antitrust case brought by the United States for injunctive relief directly to the Supreme Court if (1) the district judge who adjudicated the case, on application of a party, enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice, or (2) the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice, or (3) the district judge on his own motion enters an order with the required finding. The order of the court, or the Attorney General's certificate, must be filed within 15 days after the filing of notice of appeal.

Section 3(a) repeals section 401(d) of the Communications Act of 1934. Section 3(b) repeals the proviso in section 3 of the act of February 19, 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43).

Section 4. The new procedures provided in section 2, shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the 15th day following the date of enactment of this act. In such actions appeals shall be taken pursuant to the provisions of section 2 of the Expediting Act, as amended, which were in effect on the day preceding the date of enactment of this act.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives, there is printed below in roman existing law in which no change is proposed by the bill as reported. Matter proposed to be stricken by the bill as reported is enclosed in black brackets. New language proposed by the bill as reported is printed in italic.

UNITED STATES CODE

TITLE 15—COMMERCE AND TRADE

§ 28. Expedition of Actions by United States involving general public importance

In any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, **[**"An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven,**]** or any other Acts having a like purpose that *have been or hereafter may be enacted*, wherein the United States is plaintiff and *equitable relief is sought*, the Attorney General may file with the **[**clerk of such**]** court, *prior to the entry of final judgment*, a certificate that, in his opinion, the case is of general public importance. **[**a copy of which shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge) of the circuit in which the case is pending.**]** Upon **[**receipt of the copy**]** *filing* of such certificate, it shall be the duty of the **[**chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof,**]** *judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.*

§ 29. Appeals to Supreme Court

[In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.**]**

(a) Except as otherwise expressly provided by this section, in every civil action entered in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)

(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if:

(1) upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice; or

(2) the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice; or

(3) the district judge who adjudicated the case, sua sponte, enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

A court order pursuant to (1) or (3) or a certificate pursuant to (2) must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross-appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross-appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a).

* * * * *

TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIO-TELEGRAPHS

§ 401. Enforcement of chapter and orders of Commission; jurisdiction.

[(d) The provisions of the Exediting Act, approved February 11, 1903, as amended, and of section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under title II of this Act, wherein the United States is complainant.]

(Communications Act of 1934, sec. 401(d), June 19, 1943; chap. 652, 48 Stat. 1093)

* * * * *

TITLE 49—TRANSPORTATION

§ 43. Proceedings in equity to enforce tariffs, etc.; United States attorneys; damages; witnesses; precedence.

Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdic-

tion; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by section 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February 4, 1887, entitled "An Act to regulate commerce and the Acts amendatory thereof." And in proceedings under section 41, 42, or 43 of this title and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding. **[Provided, That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.]**

§ 44. Expedition of actions by United States involving general public importance.

In any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, **[**"An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven,**]** or any other Acts having a like purpose that *have been or hereafter may be enacted*, wherein the United States is plaintiff and *equitable relief is sought*, the Attorney General may file with the **[**clerk of such**]** court, *prior to the entry of final judgment*, a certificate that, in his

opinion, the case is of general public importance. [a copy of which shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge) of the circuit in which the case is pending.] Upon [receipt of the copy] filing of such certificate, it shall be the duty of the [chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof,] *judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.*

§ 45. Appeals to Supreme Court.

[In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.]

(a) *Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.*

(b) *An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if:*

(1) *upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice; or*

(2) *the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice; or*

(3) *the district judge who adjudicated the case, sua sponte, enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.*

A court order pursuant to (1) or (3) or a certificate pursuant to (2) must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross-appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross-appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a).

Dr. GOLDSCHMID. The Committee on Trade Regulation has had a long history of asking for the repeal of the Expediting Act.

There were letters written to Senator Tydings in 1968 and in 1969.

It seems to me quite clear that Congress should finally act on this. The problems created by the Expediting Act are too great, to me, to allow relatively minor differences to prevent legislation from passing.

Senator TUNNEY. Just getting back to 2(d), in the language of the bill, we say, "The court shall determine."

Would it make any difference to you if we used such language as "the court may"? That is a little less imperial a command.

Mr. GREGORICH. I will take a crack at that one, Senator.

I think that the objection to (d) was, by those members of our committee who objected to it, that the court, in any event, has equity power at that point, and is exercising its equity jurisdiction.

In fact, a standard for agreeing, for rubber stamping or not rubber stamping a consent decree is that the decree be equitable and that it put into effect the purposes of the Government's complaint.

The objection, as is well recorded in cases, is that the judge is really unable to carry out his equity role in these cases because he does not have enough information.

I personally would feel that it might be very salutary to provide him the information or enough information so that he can come to some sort of a determination of that kind.

Whether, however, that should be phrased in terms of public impact, I am not certain.

Dr. GOLDSCHMID. I think the problem that I see with the provision is not the "shall" or "may"—indeed, there are a number of factors you set out that I think in any controversy where a consent decree is really subject to scrutiny, the court should look to those—indeed, should, shall—it should be mandatory.

The problem really is how much will this public interest language open up. Generally, everybody is for public interest, and we think that is fine.

But antitrust goals become terribly important here, and some people's interpretation of the public interest might lead you very far afield.

I suppose my major drive is to get to the language that Justice Black, for instance, used in the *Northern Pacific* case. Antitrust and the Sherman Act are like the Constitution. It provides for allocation. It has political and social goals of enormous importance.

We want the courts—or at least I want the courts—to stay relatively close to that, and not take into account foreign trade, international relations, extraneous matters.

That is the issue.

Senator TUNNEY. In your discussion of the criminal penalties section of the bill, you endorse the proposal of the bill.

I have heard criticism to the effect that this proposal is not stringent enough, and there have been suggestions that we should do what the Common Market does on willful negligence violations, and that is to levy a fine of up to 10 percent of the defendant's business turnover in the preceding year.

What do you think of that?

Mr. GREGORICH. I would oppose that, because I think that the function of the antitrust law is, after all, to restore competition. If you talk in terms of 10 percent, you may very well eliminate that competitor altogether.

Dr. GOLDSCHMID. Senator, on this subject, of course, I speak for myself. In fact, I just completed a report for the Administrative Conference of the United States on the subject of civil money penalties in general.

My study, which took about a year and a half, is public record; it indicates that civil penalties are being used to a much greater extent than anyone believed, and they seem to be increasing all of the time.

In environmental areas, health and safety, we are now running something between \$10 and \$20 million, leaving aside the Internal Revenue area, in civil fines per year. And that is likely to increase.

Money deterrents make sense. Indeed, I concluded that the amount of many penalties collected would increase by two or three fold within the next few years.

I think conceivably such penalties would be viable here. Indeed, I think they ought to be civil as opposed to criminal. Criminal penalties put the burden on the Government; and allowing the Government to sue for money under civil standards, I think, is perfectly viable and constitutional. But here I speak for myself.

The exact measure would have to be worked out. And, as I have indicated, I think the penalties here are very moderate and, indeed, could be subject to criticism for being low in certain circumstances. Civil penalty provisions of much greater magnitude would be perfectly permissible.

But here I just speak for myself.

Senator TUNNEY. Well, thank you.

Mr. CHUMBRIS. Mr. Chairman, the record shows, when we had our hearings, 2 years ago, on this bill several years ago Mr. Comegys testified on behalf of the Department of Justice that, even though the maximum was \$50,000, the average was \$13,000 for cases that went to full trial and \$12,000 for cases that were settled by a consent decree.

Dr. GOLDSCHMID. And, of course, there are small proceedings. The fear of the small businessman that this could put him out of business with a fine even as high as \$100,000 or \$500,000 is a real fear. But, of course, we have the great corrective of having a district judge.

No district judge would impose the maximum in situations where it did not apply.

Some of those settlements, the \$10,000 or \$12,000 or \$13,000 may be perfectly appropriate. But the question is: Once you are talking about the larger corporations, should there be more weight? Should there be more potential impact?

Mr. CHUMBRIS. I have just one more point, Mr. Chairman.

Senator TUNNEY. Yes, Mr. Chumbris?

Mr. CHUMBRIS. This subcommittee, for a number of years, has been planning on holding hearings on a complete study of the entire consent decree program. As a matter of fact, when the Attorney General's committee had its major study in 1953-54 there was a report at pages 360-361 on that, Mr. Chairman, and may we have those two pages placed in the record of these proceedings as to what they recommended at that time?

Senator TUNNEY. Certainly.
[The document follows:]

3. Review Procedure Within the Antitrust Division

Evaluation along with other essential enforcement decisions requires realization that the Antitrust Division is far more than a group of prosecutors enforcing a criminal statute. In addition, it administers laws which treat important and difficult problems in American industrial activity. Making and winning a case is a normal function of a prosecutor. But making and winning a case is not always the most effective procedure for the enforcement of the Sherman Act. Careful analysis of economic and marketing problems is also required as well as an understanding review of business conduct and basic questions as to the public interest. These and related questions are best considered in an atmosphere not dominated by a zealous prosecutor bent solely on court success.

We realize, of course, that the Assistant Attorney General and the staff responsible to him and the Attorney General review proposed actions to seek some detached appraisal of the advisability of formal proceedings. In many situations, however, we believe that certain problems demand careful consideration by one or more experienced staff lawyers and economists having no prosecuting or other responsibilities. No set review procedure is recommended. We merely point out that the Assistant Attorney General in charge of the Division may designate *ad hoc* or continuing groups as the need and the problem at hand may suggest.

The designated group would review any matter submitted by the Assistant Attorney General on his own initiative or in response to the request of a potential or actual defendant. The Assistant Attorney General could, in his discretion, submit any problem and accept or reject any recommendation. However, the following situations seem appropriate to the Committee for submission to this review group for its advice:

(a) Where a substantial question of policy or a serious doubt exists as to whether any proceedings should be instituted and if so, whether such proceedings should be civil or criminal;

(b) Where important issues arise involving the relief to be sought in civil proceedings—either in advance of a complaint or at the close of litigation;

(c) Where deadlocks have arisen in the negotiation of consent judgments;

(d) Where proposals have been made by parties under investigation for settlement by negotiation of a consent judgment prior to the filing of a complaint.

This recommendation, we recognize, treats matters of staff organization and Division internal procedure. Nonetheless, far more than mere management detail is involved. We propose an experiment which, if it gains respect through experience, can play an important role in promoting fair and effective enforcement. We leave to the teachings of operation the details of timing, organization, and whether parties have a right to review in given situations. Instead we set forth only the outlines of a principle designed to assure detached and considered judgment.

From this Review Procedure proposal, several members dissent: They feel: (a) it would be cumbersome and unduly wasteful since (b) the same function is now carried on by the Assistant Attorney General and his First and Second Assistant.

4. Consent Settlement Procedures

This detached view may be essential, for example, in the give and take of negotiation of consent settlements. To defendants, potential or actual, such settlements may avoid the publicity and expense of trial; to the Government, caught in the vise of increasing complaints and decreasing enforcement resources, their economy may make or break enforcement success. Indeed, from 1935 to date, 72 percent of civil actions brought were terminated by consent decrees.

Realizing the importance of the consent settlement process, we reject any notion of its curtailment. Some have urged that the Division on occasion, in anticipation of pretrial settlement, has brought weak cases. The Division, that argument runs, would be more selective were it required to try every case. This Committee disagrees with that contention. Instead, we reiterate the need for consent procedures and consider the following means for their improvement:

1. At various times in the past, Department practice was to refuse to negotiate prior to the filing of a complaint. This refusal was supported on the grounds that a complaint crystallizes the issues and thereby expedites settlement negotiations, and that otherwise potential defendants would use these negotiations as a means for delay. Recently, however, the Department has experimented with negotiations before complaint and has indicated an interest in giving this practice a full trial. The result sought is a saving of time and money as well as increased cooperation between business and the Government. This Committee endorses that experiment. We recommend prefiling negotiation whenever the Division deems it feasible for efficient enforcement.

From this recommendation, Louis B. Schwartz dissents. This proposal, he feels, will "whittle away the last remnants of judicial control and public scrutiny in this area . . . the proposal opens the possibility that the Government's complaint shall be modified so as to be consistent with the relief that defendant is prepared to consent to. But the settlement of an antitrust case ought not to be a simple matter of bargaining between the Department and the defendant." Instead "of urging the Department to broaden its use of the consent decree, the Committee ought to have considered," he feels, "certain proposals . . . for greater safeguards on the present consent decree procedure. One of these," he suggests, "would have required the Department to publish an opinion accompanying each consent decree stating the Department's case, the defendant's proposition, and the reason for the Department's acceptance of the particular compromise."

2. Current Department practice is to negotiate consent judgments with fewer than all defendants. As a result, we realize that a judgment may be entered against the litigating defendants which is less severe than that entered against consenting parties. The remedy for any inequity, however, is not to cease negotiations with fewer than all defendants. Instead, the Department should in such a case move the court to make the consent judgment coequal with the litigated decree where, for example, the litigated judgment was based on a substantive rule of law applicable to all defendants or where dissimilar judgments will prejudice the effective competition contemplated by the Sherman Act.

3. Current practice requires consent negotiations, first, with the trial staff assigned to the case until agreement on principles has been reached. Thereafter, the judgment is submitted to the Judgment Section staff for review and further negotiations often follow. The result may be unneeded duplication of effort both by Division staff and private counsel. Such waste might be avoided by some internal Division procedure aimed at crystallizing the Government's position before negotiation begins. Thus renewed and separate negotiation, after agreement has once been reached, should be minimized.

4. At present, the Department requires defendants to submit the initial draft of a consent judgment. This practice unnecessarily burdens defendants who, for example, have had no experience with antitrust matters or who cannot determine from the complaint the relief the Government considers necessary. Accordingly, we recommend that the Department submit the initial draft of a consent judgment in response to a good faith request by defendants.

5. In consent negotiation, the Department should not seek relief (1) deemed by the Supreme Court to transgress constitutional boundaries; or (2) which, in the particular case, could not reasonably be expected after litigation. It has been urged that, since the Division, no mere private litigant, enforces a federal statute, it should demand whatever relief, in the public interest, its bargaining position may coerce. We believe that view ignores the prosecutor's responsibility to stay within statutory and constitutional bounds. It threatens our goal of equitable law enforcement and, accordingly, should be rejected.

Louis B. Schwartz cautions however, that:

"If the Department had observed these seemingly fair precepts it would have cut the heart out of a number of consent decrees that powerful and excellently advised, defendants have been willing to sign in recent years. Obviously no admonition is required with regard to asking relief that is clearly unconstitutional. It is the close questions of constitutionality that the Majority Report asks the Government 'not to press in consent negotiations.'"

MR. CHUMBRIS. Now, during the franchise hearings, particularly in distribution problems affecting franchisees, we had the Snap-On Tools Corp., and also the Schwinn Bicycle cases related to us. Rather than

take a cease-and-desist order or a consent decree as many others had done in similar situations, they decided to fight the case. And they won it.

But it cost them about \$250,000 in cost plus attorney's fees. They claimed that they were a small business group, and they felt that their problem would have been different had that case gone to the Department of Justice rather than the Federal Trade Commission, and vice versa—because they take turns in accepting those types of cases.

This led to a series of complaints to the subcommittee that perhaps the consent decree, itself, is a weapon because the Government is the dominant party, whereas the persons facing the four or five reasons why they prefer a cease and desist order or a consent decree decide against trying a case. They felt that a study should be made of the entire consent decree, especially where the Government gets all it asks for through a consent decree.

When I broached that question to Mr. Timberg, who was, at one time, the head of the Antitrust Division Section on Consent Decrees, he stated as follows on page 685 of our hearings, part II, Distribution Problems Affecting Small Business, and I would like to get your reaction to it.

I find it very difficult, in this sense, to speak about this because I was, for a period of six or seven years, the chief of the section in the Antitrust Division, in charge of consent decrees.

I think it is important still in this area to bear in mind that a consent judgment cannot be negotiated in a goldfish bowl, and that you have to have some faith in the people who are negotiating consent judgments.

I think it was something of an improvement when, a few years ago, the Justice Department, anticipating some pending bills, adopted a procedure that the provisions of the consent judgment would be made public for a period of 30 days before becoming final.

It is helpful to any government servant, such as I was, for the outside public and certainly for a congressional committee to express its views as to the legitimacy of the settlements.

But I would do it after the event. I think it is quite important for there to be a clear separation of the powers between the legislative and the executive branch on this subject.

I would, therefore, limit any investigation, if you felt that one was called for, to what I call a postaudit. I would not recommend changing the existing procedures with respect to the entry of consent judgments.

But I think it is within the province of Congress at any time, if it thinks that a situation deserves looking into, to look into it, and make its recommendations.

The consent judgment works both ways. It is a method of saving businessmen a lot of money that they would oftentimes have to spend in defending the litigation. And also, it saves them from triple damage litigation.

It has advantages to the business community, as well as perhaps disadvantages.

Would you like to comment on Mr. Timberg's statement?

Dr. GOLDSCHMID. Well, basically, I agree with the idea of consent decrees, of course, saving time and money and effort on everybody's part.

And I agree and I think the bills both go to keeping closed the negotiating process until it is finished. I do not think you can negotiate in a glass bowl in that sense. I agree with that.

I might indicate some question about the idea of this deep pocket theory. I happened to be reading yesterday transcripts of some IBM proceedings in cases involving the Government and others.

In antitrust it is a strange world. Very often the gigantic Government, the Antitrust Division, is very much at a disadvantage, as com-

pared to the private defendant, in terms of lawyers, resources, numbers of staff, and other things.

Sometimes the leverage in terms of settlement of the case is very much the other way.

In general, I think it may be wise to study the consent area further. I certainly think it would be wise for Congress to consider further whether the Antitrust Division has proper resources.

In general, I think the bill as it now stands is a wise bill and, therefore, I do not think any further study, aside from this kind of hearing, is needed on it. I would support the provisions right now, as I have indicated.

Mr. CHUMBRIS. The point I was raising particularly—pinpointing it for you from the rather long two paragraphs—was the fact that in changing the procedures, he was cautioning us on changing the procedures, which is what this bill would be doing, in a sense that it might discourage the consent decree approach which may, as pointed out by the gentleman—if the procedures become too tough, they would prefer to fight the case, even though it cost them \$¼ million or \$½ million.

Dr. GOLDSCHMID. There is no doubt there is tension here. But the question is really: How much, if any, will consent decrees be discouraged by these provisions?

Extending the period from 30 to 60 days certainly cannot be a major discouragement to anybody.

Opening up the proceeding to the Government's impact statement, that would be done by Government lawyers and I have indicated I think it would take relatively little time and expense. Perhaps it would be a real aid to them in terms of thinking out the case.

Relatively few cases should involve prolonged proceedings before a District judge to consider the consent decree.

In short, I don't think the provisions are onerous enough or really onerous in any meaningful sense; and, therefore, they should not discourage many consent decrees.

I would doubt very much if they would discourage any, in truth.

Mr. CHUMBRIS. Thank you very much.

Senator TUNNEY. Thank you, Mr. Chumbris.

I really appreciate the testimony that you have given to us this morning. It has been very helpful to the committee and to me personally, and I know you have spent a lot of time reviewing this legislation.

If you have any additional comments that you would like to make, this record will be kept open. The record will be kept open 30 days, and in reviewing your testimony, perhaps you would like to make some additional comments, particularly with respect to Senator Bayh's bill, which we did not cover in detail because you had not had an opportunity to review it.

This would be beneficial to us.

Dr. GOLDSCHMID. Thank you very much, Senator.

Senator TUNNEY. Thank you, gentlemen, for coming down and giving your testimony.

Our next witness is Mr. Maxwell M. Blecher, an attorney at law in Los Angeles, Calif., a very distinguished witness. Thank you, Mr. Blecher, for being with us today.

**STATEMENT OF MAXWELL M. BLECHER, ATTORNEY,
LOS ANGELES, CALIF.**

Mr. BLECHER. Thank you, Senator. I welcome and appreciate the opportunity to appear before this distinguished committee, and, hopefully, will give you some assistance in your present inquiry.

You have my complete statement, and I would like, if it please the committee, to just highlight that.

Senator TUNNEY. I would prefer that, and it will go into the record as if read. That will give all of us here an opportunity to ask some questions.

[The statement follows:]

PREPARED STATEMENT OF MAXWELL M. BLECHER

I welcome and appreciate the opportunity to appear today before this distinguished committee to offer what I hope will be some assistance in your present inquiry.

The antitrust laws of the United States rest on the premise that our economic system should be controlled by competition rather than cartel. As the late Mr. Justice Black observed, these laws were "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." The antitrust laws "rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."¹

My entire professional experience as a lawyer has been concerned almost exclusively with antitrust. After seven years with the Antitrust Division of the Department of Justice, I have, since 1963, practiced extensively in federal courts throughout the United States as an antitrust lawyer predominantly in the representation of plaintiffs. It is on the basis of that experience that I strongly recommend that this Committee favorably report on Senate Bill 782 with the ultimate hope that this bill will become part of the antitrust laws of the United States.

The bill has three basic provisions. I regard the sections designed to modify the procedures utilized in connection with the entry of consent judgment in antitrust cases as the most important. The proposed changes are long overdue.

In the 1960's, 83% of all civil suits brought by the Department of Justice to "prevent and restrain violations" of the antitrust laws were terminated through the consent decree process. Plainly therefore, since all but a small percentage of the Department's enforcement activities in the civil area are terminated by consent judgments, it is imperative that this process work effectively.

As recently as 1972, the Supreme Court said that "the relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.' The district court is clothed with 'large discretion' to fit the decree to the special needs of the individual case."²

In practice, the District Judges to whom consent decrees are submitted do not truly perform this mandated responsibility. As presently processed consent decrees are a very private arrangement in which the court, as a practical and realistic matter, is not afforded the opportunity or assigned the responsibility of fashioning relief which will redress the violations or restore competition. Rather, these tasks are effectively taken from the Court and placed into the hands of the Department of Justice.

Though the staff of the Antitrust Division is overwhelmingly composed of highly competent and dedicated people, they are capable of erring in judgment, or reaching wrong decisions because their input is poor, or even occasionally, as Mr. Justice Douglas commented in one case of "knuckling under."³ For these reasons the proposed requirement that the Department of Justice file in the Court, publish in the Federal Register and provide any interested person with a "public impact statement," is a significant breakthrough in dissipating the effects of the present system where the prosecutor also assumes the judicial function. That change will benefit antitrust enforcement.

Under the proposed legislation the court is, for the first time, made aware of the pernicious practices on the basis of which the government undertook the litigation in the first instance. It is informed how those practices affect competition; it is informed, how, in the government's view, the proposed relief will actually affect competition and other potential litigants, and it is informed what alternatives were evaluated and considered and why those alternatives were deemed less advantageous to accomplishment than the course actually selected. Moreover, the Court will now be informed of the comments or objections concerning the proposed judgment which have been filed by interested persons with the Attorney General under the provisions of subsection (c) of the act. Should the circumstances require or dictate, the Court in its discretion may pursue the matter further by taking testimony on its own motion or on the motion of any interested party or participant; it may appoint a master to sift through the facts, or it may authorize participation, by the filing of briefs, intervention, or in whatever manner deemed appropriate of nonparties. All this, including the provisions intended to require disclosures re settlement which occur outside the orthodox lawyer-to-lawyer negotiations, is healthy. It encourages participation of those affected by the process. It more closely resembles the kind of analysis which would be required in the event of trial and is therefore more likely to lead to better informed judicial decision making.

Too frequently, particularly in major metropolitan areas where the bulk of antitrust litigation is centered, district judges, already severely taxed by reason of a burgeoning workload, tend to "rubber stamp" the purely private agreement made between the defendants and the government in civil antitrust cases. There is no scrutiny. The process suggested by Senate Bill 782 insures a full and adequate opportunity for industry people or others affected by a consent decree to be heard. It requires the trial judge to be an active participant and thus to fulfill the obligation which the Supreme Court envisioned for it in framing antitrust decrees. Lastly, it will insure a high degree of public confidence that these important decisions are being made in the traditional atmosphere of dispassionate judicial administration.

I would, however, with the greatest deference to Senator Tunney's bill, vigorously urge this committee to consider the addition of a subsection which goes beyond even the present proposal. While the present bill does provide that the public impact statement to be filed by the Attorney General must contain a recitation concerning "the remedies available to private potential plaintiffs damaged by the alleged violation * * *," I doubt that as a practical matter that provision standing alone will materially assist or influence the court in reaching a determination as to whether or not the relief followed by the proposed consent judgment is effective on the one hand or will constitute any significant benefit to private litigants on the other. Accordingly, I would propose that, as a condition precedent to either the entry of a consent decree in a civil case or acceptance of a plea of *nolo contendere* in any criminal antitrust case, the Department of Justice be required to file and make a matter of public record a detailed statement of the evidentiary facts on which the complaint or indictment, as the case may be, was predicated. No lawyer experienced in antitrust matters will deny that under the present system of consent decree disposition and *nolo contendere* criminal pleas a major, perhaps even the major benefit derived by the defendant is the suppression of the evidence on which the case was predicated. This operates to frustrate treble damage litigants who are required to face the sometimes insurmountable task of reconstructing the massive investigatory work that has been accomplished by the government through either a grand jury, the Federal Bureau of Investigation or the Antitrust Division staff, or a combination of all of these.

Very recently, Judge Manuel Real of the Central District of California made the observation that "in a nation that now exceeds one trillion forty-six billion dollars in gross national product, government cannot possibly be relied upon to provide vindication of every person or entity aggrieved by a violation of the antitrust laws. It must be left to private litigants to guarantee to themselves the assurance that the future will not repeat the past."⁴ I doubt that anyone in the antitrust bar will seriously quarrel with the proposition that today it is private litigation rather than government litigation which constitutes the most effective deterrent to the commission of antitrust offenses. While the work of "private attorneys general" has in several recorded instances gone substantially beyond that of the Antitrust Division in bringing about industry changes, frequently the

Footnote at statement end.

Government, with its far superior resources and investigatory capability, has brought cases in which private parties, including governmental bodies, have been the principal victims of the offense. I ask: What moral, legal or ethical basis should allow, as is presently the case, an antitrust violator to "cop a nolo contendere plea" or negotiate a quick consent judgment and in so doing suppress forever the often monumental amount of material collected by the Government in support of the allegations made in its complaint in indictment?

Clearly the disposition of antitrust cases without trial is a noteworthy objective but it is not more important than securing compliance with the antitrust laws and discouraging violations. The policy, as of today, makes it very easy to violate the antitrust laws without getting severely penalized in the process. I sincerely believe that if we are truly committed to a competitive economy, and a free market, then persons injured by violations of the antitrust laws should not be deprived of their recompense by processes which make the Government effort secret. Antitrust violators protected in this manner can only be encouraged to treat the law as a "joke."

For these reasons I also favor increasing the maximum fine for criminal violations from \$50,000 to \$500,000. One United States District judge remarked as recently as 1966, after the electrical conspiracy scandal, that "for big corporations [antitrust] fines are like losing \$10 in a Saturday afternoon golf game."⁵

As Senator Tunney's statement to this committee in support of this bill points out, in the period between 1955 and 1965 fines imposed in criminal cases averaged \$13,420 for corporate offenders. In fact, this reflects that the present maximum fine is nearly four times the average of the fines actually imposed. It is not, therefore, the inability to fine more heavily but the judicial reluctance to do so which is, in part, apparently making antitrust violations attractive to commit. By increasing the penalty to a maximum of \$500,000 the Congress would make resoundingly clear to the judiciary that it regards criminal violations as serious business. Hopefully this concern will reflect itself in dealing with "hard core" offenses which, indeed, are the only offenses traditionally attacked by the Department of Justice via indictment.

While completely endorsing the clarifying provision permitting the government to appeal denial of preliminary injunctive relief, I endorse with some uneasiness the changes in the present Expediting Act provisions which mandate appeal of Government civil antitrust cases directly from the District Court to the Supreme Court. For at least 30 years the decisions of the Supreme Court have reflected a steadfast dedication to antitrust enforcement. The present Court has already demonstrated equal solicitude for antitrust. Without such a Supreme Court the antitrust laws would be a dead letter because, on the whole, the lower courts have shown an indifference and sometimes an outright hostility to the antitrust plaintiff. Comforted by the fact that either the trial judge or the Attorney General may certify important or novel civil cases for direct appeal, and acknowledging that not every Government civil case is sufficiently earthshaking as to warrant further burdening the Supreme Court, the dangers which I associate with obviating the direct right of appeal lessen.

In summary, I commend Senator Tunney for this noteworthy contribution to antitrust enforcement and encourage this committee to recommend its enactment into law.

Mr. CHUMBRIS. Mr. Chairman, that applies to the two previous witnesses, also.

Senator TUNNEY. Yes, I have already put that into the record as if read for the two previous witnesses. So yours will be considered as read.

Please proceed.

Mr. BLECHER. Just so you will have a little insight into my background. Since 1955, when I was admitted to the bar, my entire pro-

¹ *Northern Pacific Railroad Co. v. United States*, 78 S. Ct. 514, 517 (1958).

² *Ford Motor Co. v. United States*, 92 S. Ct. 1142 (1972).

³ *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 87 S. Ct. 932, 950 (1967).

⁴ *Calnetics Corp. v. Volkswagen of America, Inc., et al.*, 348 F.Supp. 606, 620 (C.D. Calif. 1972).

⁵ *United States v. Chicago Linen Supply Association*, Antitrust and Trade Regulation Report, No. 276, A16, Oct. 25, 1966.

fessional career has been consumed with antitrust work, 7 years with the Department of Justice, and since 1963, in private practice engaged solely in the antitrust litigation, predominantly for plaintiffs which I think distinguishes a very small segment of the antitrust bar confined with that activity.

We have all agreed that the great majority of Government civil antitrust cases are disposed of by a consent decree process. The Supreme Court has made the observation, over and over again, most recently in 1972 in the *Ford Motor* case, that it is the responsibility of the district judge in every antitrust case that is litigated to fashion a decree designed to restore competition and to redress the violation.

Now, the plain and simple fact is that in the real world isn't what is happening in the consent decree process. The district judge is, as the committee has observed, in most instances, except in the most extraordinary circumstances, essentially a rubberstamp, and he doesn't get a real opportunity to understand and participate in the process.

And it is for those reasons that I strongly endorse the consent decree revision provisions of the Senate bill 782. If that proposed legislation becomes law, it will be the first time in the great majority of cases disposed of by consent decree where the district court becomes aware of the pernicious practices which underlie the complaint.

It will be the first time the district court really gets an opportunity to judge independently how the proposed consent decree affects the competition which was eliminated by the restraint, which caused the filing of the complaint in the first instance.

It is the first time the district court is required to make an analysis of how other potential litigants and people who have been victimized by the violation are affected by the entire process.

And that is essentially the mandated responsibility of the district court. Thus, this bill restores that district judge to the job he is supposed to be doing, eliminates the private negotiations that now characterize the consent decree process.

It is basically, as you have pointed out, a private contract.

I would, however, make this observation about the bill. In some distinction to the preceding witnesses, I do not regard the enforcement program by the Government, whether criminal or civil, as the greatest deterrent to the commission of antitrust violations.

I think today there is a large area of agreement among the lawyers who labor in the antitrust field, that it is the private case which constitutes the greatest deterrent to antitrust violation. And in that context I would respectfully submit to you, Senator, that the bill really does not go far enough.

I think the idea of the public impact statement, forcing the district judge to focus on the pernicious practices and participate as he would if it were a litigated decree are all very constructive. But the consent decree or nolo contendere plea is being used by guilty defendants in most instances to suppress the evidentiary facts, which the Government must have labored long and hard, often by grand jury, often by a Federal Bureau of Investigation investigation, often by actual fact-to-face contacts by lawyers in the Antitrust Division. All that evidence becomes suppressed by a consent decree, or a nolo contendere

plea, and the result is that it becomes easy and profitable for defendants to go on violating the law.

I think we get a little too consumed in the process with the technicalities and we lose sight of the fact in antitrust, the entire enforcement program is designed to bring about compliance on the part of large corporations and small corporations with the law so that the economy is competitive.

And in that process we make it easy for the defendants to get away with these violations. We simply have lost sight of the ultimate objective to be attained.

Now, I would purpose a section be added to the legislation, and it would provide very simply this: That as a condition precedent to a district court's acceptance of a *nolo contendere* plea or a consent decree, the Government be required to file and make a matter of public record the evidentiary facts on which the complaint, or in the case of a criminal case, the indictment was based.

It's going to constitute no burden—and I suppose we may talk about this in the question and answer process, because you seemed to direct some questions to the preceding witnesses on this point—but before an indictment is returned, the staff, the trial staff in the Antitrust Division, writes a very detailed, factual memorandum that is submitted in the case of an indictment to the Assistant Attorney General for approval before the trial staff can solicit indictment.

In the case of a civil complaint, that fact memorandum, equally detailed, goes directly to the Attorney General or his immediate representative for approval before a civil complaint bearing the Attorney General's signature is filed.

So that fact collocation has already been prepared, and I simply submit in order to aid the private enforcement of the antitrust laws, which is really where the enforcement program is at today, there being an almost dearth of activity at the governmental level, I would submit that that factual evidentiary statement be filed as part of the consent decree-*nolo contendere* process.

Now, I endorse, though I think it will have very little effect, the provision about raising the criminal penalty. I endorse it because I think, for the most part, while judges are generally conscientious and concerned they do, in many instances exhibit indifference to antitrust, being consumed with crimes of more violence and more immediate impact.

And, in some instances, you get judges actually who are outright hostile toward antitrust enforcement. I think if the Congress were to come along today and say, "We regard this as a serious offense. We want you to take cognizance of it. We want you to treat it with a certain degree of importance. It is just as important if a group of businessmen get together and steal money in a hotel room, as it is for some young kids to do it by other means."

I think that the effect of increasing the fine is to tell the judiciary "We, the Congress, regard this as a serious offense."

Now, as my statement indicates, Senator, I endorse the provision about the Expediting Act with a great uneasiness and reluctance. The Supreme Court is the bastion of antitrust enforcement in the United

States. It has been for the last 30 years, and the present composition of the court has not altered its apparent dedication to antitrust philosophy.

And the idea of getting more and more cases out of the Supreme Court is designed largely by defense lawyers as a means of weakening the Supreme Court's repeated statements supporting vigorous anti-trust enforcement.

I understand that the Supreme Court is overworked, although Mr. Justice Douglas doesn't seem to agree, and I recognize that not every civil antitrust case is of great moment. And so as long as the provisions, which permit the Attorney General to certify those cases he regards as significant or novel, or the district judge has that opportunity to take the case directly to the Supreme Court, still with a certain uneasiness, I would think we are making a constructive effort towards reducing the workload of the Nation's highest court.

Senator TUNNEY. Thank you very much.

I would just add that some justices are quick studies and some are not. Apparently Justice Douglas is a quick study. I think that he was the only justice, wasn't he, that said he felt there was not enough work to do at the Supreme Court?

Mr. BLECHER. He's frequently the only justice who says a lot of things. [Laughter.]

Senator TUNNEY. How would you respond to the testimony that we just heard—suggesting the submission of the public impact statement would suffice to involve the court as an independent arbiter, and that subsections 2(d) and 2(e) ought to be eliminated from the bill?

Mr. BLECHER. Well, I would respectfully dissent. I think that those two subsections are really at the heart of the matter, and the filing of a statement that doesn't require judicial response, that doesn't require judicial action, that doesn't mandate the judge to get involved, simply is not likely to change the present procedure of rubber stamping, particularly in the metropolitan areas where we sympathize with judges, who are often overworked.

And I think you have just got to, in the first instance, force a change of habit, force them to get involved. And I don't think they are going to spend great periods of time, Senator. I think that this procedure is not likely to affect the routine settlement of routine civil cases at all.

It's only going to be utilized in any meaningful way in cases of maior importance.

Senator TUNNEY. Do you think that 2(e) circumscribes the independence of the judicial determination as to whether or not a consent decree—

Mr. BLECHER. Not at all, Senator. I think most judges are sufficiently independent that they will read "may" as, you know, "can" not exclusionary. They are not going to say this is all I consider. Besides, I think the whole bill has to be read in the context of the Supreme Court's oft repeated admonition that the district court has a responsibility to fashion a decree that restores competition and redresses the violation.

And so I think the judge is going to start with saying, "That is what the Supreme Court said I have to do, and all this bill is telling me some of the things I really ought to take a look at in doing it." So I

don't think he is going to regard it in the average case as limiting his ability to consider other factors.

Senator TUNNEY. Well, I agree with you, particularly if you read the language of the bill. It states in (e), in making its determination under subsection (d), the court may take testimony on certain applicable things.

I don't see anything in that language that would make it exclusive.

Mr. BLECHER. Not at all. Let me observe, Senator, in the central district of California from whence we both originate, there were two very important antitrust cases settled by consent decree, which aroused a great deal of public interest.

One, as you may recall, is the smog control device, which almost every governmental body in the United States opposed. The other was one which a lot of housewives and business merchants were concerned about, the *Blue Chip Stamp* case.

Now, both cases happen to be in the hands of very responsible and working judges, and in both instances, they listened to, digested, and in fact, in the *Blue Chip Stamp* case, modified the consent decree as a consequence of listening to the public.

And that is an illustration of the kind of good that can be achieved here. Now, under present law, the judge doesn't have to pay attention to anything. He didn't have to hold any kind of hearings or permit the filings of any briefs.

So what we are really doing is saying where there is a case of some urgency, where there is a public interest in it, the judge ought to involve himself. As a matter of law, he ought to have the responsibility to do it.

Senator TUNNEY. I was interested in your comments, also, that you did not feel that the consent decree provisions would be too burdensome to the Antitrust Division, and you articulated the fact that even now a very detailed statement is made to the Assistant Attorney General, as to what the facts of the case are, what the impact would be, and, in effect, what we were saying is this does need to be made public.

Mr. BLECHER. Absolutely, Senator. I don't mean to sound flippant, but with the present inactivity of the Antitrust Division they ought to welcome the opportunity to have something to do.

But, in any event, what you are proposing by this legislation has already been done, at least it was done in my day, by the trial staff. When you went to settle a case, you had to justify it. When you filed a complaint, you had to have a detailed fact memorandum.

There isn't any reason in the world the judge ought not to have the benefit of that. The Attorney General makes a decision to file the case with more facts than the district judge has to enter an in perpetuity decree. Now, I just don't think that's right. I just don't think it falls into focus.

Senator TUNNEY. How many years did you serve in the Antitrust Division of the Justice Department?

Mr. BLECHER. Seven.

Senator TUNNEY. Seven years. And I would assume that you had to draw up a number of these fact statements—

Mr. BLECHER. I certainly did.

Senator TUNNEY [continuing]. For the Assistant Attorney General?

Mr. BLECHER. And, as I say, in the case of an indictment, it goes to the level of the Assistant Attorney General in charge of the Antitrust Division. In the case of the civil complaints, which are signed by the Attorney General, himself, or his designee, the fact memorandum justifying the filing of the complaint goes directly to the Office of the Attorney General.

And we are not talking about imposing any burden that hasn't been undertaken before the case was actually brought, so I think it's spurious to suggest that it's going to impose a great burden on the time of the Antitrust Division—not at all.

Senator TUNNEY. I was interested in your criticism of the bill, that it doesn't go far enough. I have a question with regard to your theory. You suggested that the major benefit derived by the defendant when he enters a consent decree could be the suppression of the evidence on which the case was predicated.

You suggest that the Department should be required to file and make a matter of public record, a detailed statement of the evidentiary facts on which the complaint or indictment was predicated.

Would this—assuming your premise is correct—virtually eliminate consent decrees, at least in important cases?

Mr. BLECHER. I would very much doubt it, Senator. I think that what encourages the entering of consent decrees today is the defendant's desire to suppress this information. If they know they are not going to suppress it, but they are guilty, the incentives to dispose of the case by consent are still present because they are saving the trouble of trying and publicizing the case and they are generally able to make an arrangement with the Government more favorable than they would after a complete trial on the merits and the imposition on the court's time.

The court takes the fashioning of the civil consent decrees, after litigation, pretty seriously. And let me make this side observation, because really that question contains a philosophical question. And that is, whether this consent decree process used as pervasively as it is being used, is itself in the public interest.

I question that. I think we ought not to make a sacred cow out of consent decrees or out of settlement, generally. I think the purpose of antitrust is not to file cases and dispose of them quickly, so that the prosecutor doesn't have to do a lot of work, and so the judges don't have to be burdened with them—that whole philosophy what implicitly has been suggested by the preceding witnesses to some extent. That whole philosophy perverts the very purpose of antitrust, which is to make the corporate community aware of the fact that they have been mandated by the Congress to compete. And I strongly urge we not be buffaloeed by this idea that there will be a little more work at the Antitrust Division or 4 or 5 or 6 or 10 judges around the country will have to spend a few more weeks in trial on these cases.

I just don't think that is important in the bigger picture of what we seek to accomplish under the antitrust laws.

Senator TUNNEY. Mr. Blecher, you also stated that as Judge Real states, it must be left to private litigants to most effectively enforce the antitrust laws. If this is the case, would you think that it might be appropriate for the public disclosure provisions of Senator Gurney's and my bill to apply to private antitrust settlements, as well as to those

between the Government and the defendant? This question should be considered in light of the IBM-Control Data settlement.

Mr. BLECHER. I would certainly have no objection to it. I have recently been involved in two private cases, which for the first time have secured divestiture as a remedy in civil antitrust litigation brought by a private party. And I think the same considerations—both judges in those cases commented that they regarded the plaintiff as a private attorney general—the same considerations ought to apply in those instances, as the Government cases.

Senator TUNNEY. Have you had an opportunity to review Senator Bayh's bill?

Mr. BLECHER. Briefly, Senator. I think, in general, it is too general. I prefer the Tunney-Gurney version because of its detailed nature, which clearly maps out the responsibility of each of the participants in this program, and it also gives you a specific and detailed knowledge of what each party is supposed to do, and how the process works.

The Bayh bill, as I see it, is just a little too generalized, a little too broad to be pulled down and viewed concretely. There is one provision in it, however, that I think merits some consideration of the committee, and that is the broader publication of the proposed consent decree than is now envisioned in this bill.

And I would think, perhaps, the addition of the concept of publication in a newspaper of general business circulation might be helpful.

Senator TUNNEY. Thank you very much, Mr. Blecher. You have been very, very helpful. I was wondering if Mr. Chumbris had any questions.

Mr. CHUMBRIS. No, thank you, Senator.

Mr. BANGERT. No, sir, Senator.

Senator TUNNEY. Thank you very much. We appreciate your participation.

Our next witnesses are James Campbell and Robert Hammond, who are attorneys in the Washington, D.C. area.

STATEMENT OF ROBERT A. HAMMOND III, ATTORNEY

Mr. HAMMOND. Thank you, Senator Tunney.

Mr. Campbell and I, as you noted, are in practice in Washington. We are partners in the firm of Wilmer, Cutler and Pickering, and our association goes back considerably further than that to a time when we were both attorneys in the Antitrust Division of the Department of Justice.

Senator TUNNEY. I wonder if it would be possible to have your statements included in the record as if read, and then maybe you can summarize them for the committee so that we could spend some time asking questions.

Mr. HAMMOND. I will do that to the best of my ability, Senator. I must admit that I wrote my statement in greater haste than I usually do, and I will summarize as well as I can.

Senator TUNNEY. It will be included in the record as if read, and if you want to read every word, that is fine.

(The statement follows. Testimony resumes on p. 68.)

STATEMENT OF ROBERT A. HAMMOND III, ON S. 782, THE ANTITRUST PROCEDURES AND PENALTIES ACT, MARCH 15, 1973

I am glad to be here this morning in response to the invitation of this subcommittee to give you my views on S. 782, the proposed Antitrust Procedures and Penalties Act. I would like to make clear at the outset that I am presently engaged in the private practice of antitrust law and that I represent clients who might be affected by the provisions of this bill. Although I appear today as an individual expressing my personal views on S. 782, the subcommittee should be aware of the above facts in considering my statement.

The bill this subcommittee is considering today, the Antitrust Procedures and Penalties Act, would modify enforcement of the antitrust laws in three important respects. First, the bill would substantially increase the criminal penalties for Sherman Act violations; second, it would amend the Expediting Act to provide (with certain exceptions) for initial review of antitrust decisions in the courts of appeals; and third, it would establish a new set of procedures governing the negotiation and acceptance of consent decrees. The first two of these three sections of the bill have been the subject of previous legislative proposals and have been widely considered and commented on by antitrust lawyers and others. I shall not discuss these sections except to say that I believe they would perform important functions in strengthening antitrust enforcement.

I shall confine my remarks this morning to the third section of the bill, dealing with consent decree procedures. These provisions of S. 782 represent a constructive approach to the development of consent decrees as a more effective instrument of antitrust policy. Everyone familiar with antitrust enforcement recognizes the immensely important role of consent decrees. The great majority of all civil antitrust actions brought by the Department of Justice result in consent orders. Given the limited resources of the Antitrust Division, there is no realistic alternative to this process if we are to have effective antitrust enforcement. Even if the Department had sufficient resources to try all of its cases, such a process would be wasteful in the extreme in the great majority of cases where adequate relief can be obtained by consent.

Because of the value of the consent decree process, any modification of that process which would have the effect of significantly limiting its availability would present a serious threat to antitrust enforcement. But this does not mean that the consent decree process cannot be improved. With a few exceptions, I believe the present bill follows this route and that its proposals will improve the consent decree process without impairing its usefulness as an instrument of antitrust enforcement.

Consent decrees, by their nature, present two special problems. The first problem is one of public confidence. This results from the fact that while consent decrees take place after a public decision to sue has been made and announced by the Department of Justice, they are the product of private negotiation which affords relatively little opportunity for participation by affected persons or by the courts. Under these conditions, suspicions may arise that the government has been out-bargained or that it has changed its original position as a result of improper political pressures. It may, of course, be objected that the same opportunities exist—and occur much more frequently—when the Department decides not to bring a case. In the latter situation, however, there at least is no public change of position, with its inevitable implications for future enforcement policy, and no foreclosure of the government's opportunity to change its mind and to challenge the same or similar practices in the future.

This distinction between consent orders and decisions not to sue suggests the second unique feature of the consent decree process. This is the fact that consent orders, although obviously not designed as announcements of public policy, inevitably are viewed by the public as one of the means by which the Department announces its enforcement policies. It is hardly an original observation that the breadth of the antitrust laws gives the enforcement agencies the widest possible discretion and that the exercise of this discretion represents an important aspect of economic regulation. Because of this discretion in antitrust enforcement, what the Department of Justice says may be as important as what the courts decide.

The Department has properly recognized that this discretion creates both an opportunity to achieve substantial antitrust compliance by the announcement of its enforcement intentions and an obligation to provide business with a clear understanding of governmental policy. For these reasons, the Department regularly makes public its enforcement intentions through such devices as its merger guidelines and in the speeches and other public statements of its officials.

Enforcement policy is also expressed, of course, in the briefs and other pleadings which the Department files in litigated cases—and in the consent decrees which it negotiates with defendants.

The relief requested or agreed to by the Department in an antitrust case obviously reflects the Department's view of the violation alleged. In fact, in some cases the prayer for relief is more revealing than the allegations of the complaint. And because such a large proportion of antitrust cases are terminated by consent decree, these decrees are inevitably looked to for guidance and cited as precedent by businessmen and their counsel—warnings to the contrary by Department officials notwithstanding. On occasion, almost an entire area of antitrust law has been developed through a series of consent decrees—for example, cases challenging reciprocal dealing have almost without exception been terminated by consent decree and the provisions of these decrees are at least as instructive as the complaints themselves in showing what the Department believes to be the elements of the offense.

For all of these reasons, consent decrees inevitably play a major role in the critical function of articulating antitrust doctrine. Where for undisclosed reasons—however meritorious those reasons may be—a consent decree appears inconsistent with the allegations of the complaint or its prayer for relief, it may seriously impair this function of the antitrust enforcement process.

This is particularly true in areas of legal uncertainty. From the point of view of precedent or guidance it matters little whether a consent decree in a civil price-fixing case does or does not include such relief as a requirement for the issuance of new price lists—the presence or absence of such a provision obviously conveys no indication of the Department's position with regard to the legality of simple price fixing. But where the complaint involves complex practices such as patent licensing provisions, or where it challenges changes in industry structure resulting from mergers or alleged monopolization, public understanding of the Department's theory may be strongly affected by the relief it requests or accepts. For example, where a merger case is settled on the basis of the divestiture of assets other than those acquired in a challenged transaction there may be legitimate question as to whether the Department is still relying on the theory reflected in its complaint. This is not to say that such relief may not be appropriate, but merely that where it is accepted without explanation, there is a danger that public confusion with regard to the Department's enforcement policy may result.

The provisions of S. 782 reflect two approaches to improving the effectiveness and integrity of the consent decree process. First, the bill includes several provisions which contemplate more extensive involvement by the courts in the consent decree process. These include, primarily, the requirement of a judicial determination that a proposed decree is in the public interest and provisions for the participation or intervention by third parties.

The other approach reflected in the bill is directed to making the reasons underlying the acceptance of a consent decree, and the process by which it was negotiated, more open to public view. These provisions include: (1) a requirement for the filing of a "public impact statement" which would recite the nature and purpose of the proceeding, a description of the practices giving rise to the alleged violation, and an explanation of the anticipated effects of the relief contained in the proposed judgment; (2) a requirement that the Department consider and respond to comments submitted by interested persons; and (3) a requirement that the defendant file with the court a description of all communications, except by counsel of record, with any government official relating to the proposed judgment.

I understand that Mr. Campbell will address himself primarily to the appropriate functions of the courts in the consent decree process. While I agree with Mr. Campbell that the courts do have an appropriate function in some circumstances, I believe that this function is necessarily a limited one, as he also points out. Our judicial system has been designed for, and has succeeded in performing, a particular function—the determination of controversies on the basis of an

adjudicated record. The courts have no special expertise to determine, absent such a record, whether a proposed consent decree is in the public interest; and, of course, if the making of a record is required, the purposes of the consent decree process have been defeated. Moreover, it is plain that the courts cannot compel the government to litigate a case which it wishes to settle. And finally, from the point of view of the need for the coherent and consistent development of antitrust policy, courts obviously cannot insist that a consent decree reflect a reliable articulation of antitrust doctrine. This can be done only by the Department of Justice.

For these reasons, it is my view that primary reliance for improvement of the consent decree function must continue to rest with the Department of Justice. The principal function of the courts must be to insure the meaningful performance of the other requirements of the bill which provide for greater public exposure and explanation of the consent decree process.

Of these provisions, the most significant is the requirement for the filing and publication by the Department of a statement explaining the purpose of the proceeding, the anticompetitive practices involved, and the anticipated effects of the relief contained in the proposed consent judgment. Such an explanation will require the Department to relate the provisions of the decree to its views of the requirements of the antitrust laws. This should provide a valuable vehicle for the explication of antitrust enforcement policy and should prevent the confusion—or the suspicion—which may arise where the provisions of the decree do not on their face appear consistent with the prayer for relief or the allegations of the complaint. It goes without saying that the requirement will also make it more difficult for the Department to justify an obviously weak decree and will provide a basis on which the court may decide whether acceptance of the decree is truly in the public interest.

The requirement for such a public explanation of the basis of a consent decree is not a new idea. Professor Louis Schwartz suggested such a requirement in a dissenting statement in the 1955 Report of the Attorney General's Committee to Study the Antitrust Laws. This recommendation was repeated in the 1959 Report of the House Antitrust Subcommittee on the Department of Justice's consent decree program. The report stated, "When the Department of Justice presents a consent decree to the court for its approval, it should be accompanied by a statement that sets forth the facts involved, the defendant's position, the meaning of the provisions used in the decree, and the reasons that form the basis for the Department's acceptance of the particular compromise. The necessity to make such a statement should go far to insure against arbitrary action in the consent disposition of antitrust litigation." It is also interesting to note that in a different statutory context 8 U.S.C. § 1329 requires that the reasons for the settlement of various immigration and naturalization suits must be disclosed and made a matter of record.

My only suggestion with regard to this provision of S. 782 is that it might expressly require that the Department's statement include an explanation of any respects in which the proposed judgment differs from the prayer for relief or does not clearly respond to the allegations of the complaint. It is my understanding that such an explanation is presently required by the Federal Trade Commission's internal procedures when its staff submits a proposed consent agreement to the Commission for approval.

At the same time, I think the bill's requirements that the Department's statement include a description of the remedies available to potential private plaintiffs, the procedures available for modification of the judgment, and a description and evaluation of the alternatives to the proposed judgment might well be eliminated. These matters should be well enough understood by the affected parties, or at least by their lawyers, and their inclusion unnecessarily adds to the burden which the requirement imposes on the Department of Justice.

The section of the bill, which provides for consideration and response by the Department with regard to comments concerning the proposed consent decree, appropriately supplements the requirement for a statement explaining the proceeding and its proposed disposition. This section will insure that the Department in fact considers and responds to all expressed concerns relating to the decree and not merely to the problems which may occur to it in the preparation of its initial statement.

The remaining section of the bill relating to greater public exposure of the consent decree process would require the filing with the court of a description

of all written and oral communications (other than by counsel of record) by or on behalf of the defendant, with any government official concerning the proposed decree. The provision properly refrains from seeking to prohibit such communications since they may be appropriate and in fact may serve a valuable function. Other agencies of the government may well possess special knowledge concerning the industry or practices concerned and there is surely no reason why these agencies should not be encouraged to communicate such information to the Department. Moreover, by excluding contacts made by counsel of record, this provision of the bill properly declines to require burdensome intrusion into all of the many routine contacts which are a necessary part of a consent decree negotiation. My only suggestion concerning the drafting of this section is that the requirement for the recording of contacts by officials of the company with the Department of Justice be deleted since, in many instances, officials of the company accompany counsel of record in the routine negotiations with the Department. With this exception, however, I see no reason why communications with other branches of the government concerning a proposed decree should not be recorded and I do not believe that such a requirement should inhibit such communications where they are appropriate.

The one reservation I would voice concerning the bill's requirements for statements explaining proposed consent decrees and responding to comments received from others is the additional burden which this will inevitably place on Antitrust Division officials. Such statements inevitably will be among the most important expressions of the Department's antitrust enforcement policy and will be relied upon and cited as precedent by businessmen and their counsel. As I have already stated, this is as I think it should be. Indeed, the proposition that consent decrees should be publicly explained in the broader context of enforcement policy is at the heart of my support for these provisions. By the same token, however, the significance that will be attached to the Department's statements makes it clear that they will require the most careful preparation and review at the highest level of the Antitrust Division—a place where available manpower is a very scarce resource. This cost should be considered by the Congress and adequate appropriations should be provided for the performance of these additional functions.

Mr. HAMMOND. No, I think there are a number of things that can well be included in the record only.

I would like to say at the outset that both Mr. Campbell and I are engaged in private practice. We both represent clients who might be affected by the provisions of this bill.

And while we both appear today in our personal capacities to express our individual views on this bill, I did want to make that fact clear for the subcommittee to consider in giving any consideration it does to what we have to say.

Senator TUNNEY. Absolutely.

Mr. HAMMOND. I want to comment today only on the part of the bill that deals with the revised consent decree procedures. The other two parts of the bill, increasing the criminal penalties and amending the Expediting Act have been commented on before in the course of proposed legislation.

I would just like to say that I endorse both of those provisions. I think both of them would make a substantial contribution to the enforcement of the antitrust laws.

The new part of the bill, of course, is that which deals with consent decree procedures, and I don't think anybody underestimates the importance of the role of consent decrees. As everyone has noted, the great majority of antitrust cases are settled by consent decree, and given the resources of the Antitrust Division, I think there is really no realistic alternative to that.

And I would add that even if the Department had substantially more resources, I think those resources ought to be spent bringing more

cases, rather than in the wasteful process of litigating cases where both parties agree on that relief that is adequate.

Because of the value of the consent decree procedure, I think any modification which would limit its availability would be a serious threat to antitrust enforcement. But that doesn't mean that the consent decree process can't be improved. And I think that this bill looks in the direction of improving that procedure without threatening its usefulness.

Getting to the heart of the problem, consent decrees, by their nature, present two problems. The first is simply one of public confidence. Consent decrees take place after there has been a public decision to sue, announced and taken by the Department.

On the other hand, they are the product of private negotiation which affords relatively little opportunity for participation by affected persons or by the courts. And under these conditions, I suppose it is natural that suspicions may arise that the Government has been outbargained, or that it has changed its position because of improper pressures of some kind.

Now, I know the objection can be made that the same opportunities exist and occur a lot more frequently when the Department simply decides not to bring a suit.

But, at least in this situation, there isn't any public change of position as there may be in the case of a consent decree, with its inevitable implications for future enforcement policy, and there is no foreclosure of the Government's opportunity to change its mind and to challenge the same or similar practices sometime in the future.

So there is a distinction, and I think this distinction suggests the second unique feature of the consent decree process. This is the fact that consent orders, while they are not designed as announcements of public policy, inevitably are viewed by the public as one of the means by which the Department announces its enforcement policies.

It is not an original observation to note that the breadth of the antitrust laws gives the Department immense discretion in the kind of cases that it brings, and that the exercise of this discretion is an important aspect of economic regulation.

And because of this discretion what the Department says may often be considerably more important to businessmen than what the courts actually decide.

The Department has properly recognized that this discretion that it is given creates both an opportunity to achieve substantial compliance with the antitrust laws and with their purposes by making clear its enforcement intentions and at the same time an obligation to give business as clear an understanding as possible of Government policy in this area.

For these reasons the Government has announced its intentions through devices such as formal guidelines and through less formal means such as speeches and other public statements.

Also, of course, its policy is expressed through briefs and other pleadings which it files in litigated cases, and most relevant to our discussion today, in the consent decrees, which it negotiates with defendants.

The relief that the Department requests or agrees to in an antitrust case obviously can't be separated from its views of the violation. In

fact, in some cases the prayer for relief in an antitrust case is considerably more revealing and provides more guidance to the bar than the allegations of the complaint itself.

And because such a large proportion of antitrust cases are terminated by consent decrees, these decrees are inevitably looked to for guidance and are cited as precedent by businessmen and by their counsel.

In fact, there are occasions where almost an entire area of antitrust law is built up by the consent decree process. For example, in the area of the law involving the challenge of reciprocity as a practice, cases have almost invariably been settled by consent decree, and you learn a lot more about what the Department views as the elements of the violation, and what is or is not legal, by looking at the prayers for relief and the consent settlements in those cases than you could by looking to any court decisions, which, for the most part, simply aren't there.

For all these reasons, I believe that consent decrees inevitably play a major role in the critical function of forming and articulating antitrust doctrine. However, where for reasons which are undisclosed, however meritorious those reasons may be, a consent decree appears inconsistent with the allegations of the complaint or its prayer for relief, it may seriously impair this function of the antitrust enforcement process.

To give an example, we often find cases challenging methods of distribution or challenging patent licensing practices, which challenge a number of facets of the arrangement between the parties, and ask for relief on each of them.

Now, if the consent decree in such a case doesn't get relief on some of those practices, there may be perfectly good reasons for this. It may be that the Government has decided that, as is always true, some of those practices are more important than others, and if it gets relief on the important ones, it doesn't need relief on all of them. Or it may have found, on looking at the matter further, it didn't have the evidence that it originally thought it had on some of them. Or it may simply have changed its mind, and decided that some of them weren't illegal. But unless we have an explanation of the decision, the function of the decree in explaining to the public what the Division's view of the law is, has been impaired. And I think that is a serious shortcoming in some, although by no means all, antitrust decrees.

The provisions of the bill we are considering today—and I am speaking principally of your bill, rather than Senator Bayh's bill, which I really haven't looked at that carefully—take two approaches to improving the effectiveness and the integrity of the consent decree process. First, it contains several provisions which contemplate more extensive involvement by the courts in the consent decree process.

These include, of course, the requirement of a judicial determination that a proposed decree is in the public interest and the provisions for greater participation or intervention by third parties.

The other approach reflected in the bill is directed toward making the reasons underlying the acceptance of the decree, and the process by which it was negotiated, more open to public view. These include, as has been discussed this morning, the requirement of a public impact statement, the requirement that the Department consider and respond

to comments submitted by others, and the requirement that the defendant file with the court a description of communications with Government officials.

Mr. Campbell is going to address himself primarily to the appropriate functions of the courts in the consent decree process. I agree with Mr. Campbell that the courts do have an appropriate function in this process, but I must say that I believe it is necessarily a limited one, and he points this out, as well.

Our judicial system is well designed and performs well with regard to a particular function, that is, deciding controversies on an adjudicated record. I don't think the courts have any special expertise, which absent a record, enables them to second guess the Department in a reliable way, and make a judgment whether a consent decree is in the public interest.

And, of course, if we make the record that is necessary for the courts to act, and on which they normally act, we have defeated the purpose of the consent decree procedure.

Moreover, it is plain that the courts, whatever they try to do, simply cannot compel the Government to litigate a case that it wants to settle. And, finally, from the point of view that I have been discussing this morning, of the need for coherent and consistent development of antitrust policy, the courts obviously can't insist that a consent decree reflect a reliable articulation of antitrust doctrine. This has to be done by the Department, itself.

For these reasons, it is my view that primary reliance for improvement of the consent decree process has to continue to rest with the Department of Justice, and for that reason, as I see it, the principal function of the courts should be to make sure that the other provisions of the bill do, in fact, work well, and aren't merely given lipservice.

Of these other provisions, the most significant is the requirement for the filing and publication by the Department of a statement explaining the purpose of the proceeding, the alleged anticompetitive practices, the anticipated effects of the relief, and so forth.

I think this should provide a valuable vehicle for the explanation of antitrust policy, and should prevent the confusion, and sometimes the suspicion, which arises when the provisions of the decree appear on their face not to be consistent with the prayer for relief or the allegations of the complaint.

It goes without saying, of course, that this requirement also will make it more difficult for the Department to justify an obviously weak decree, and will provide a basis on which the court can decide whether the acceptance of the decree is proper.

I think it's interesting that this idea for the requirement of a public explanation isn't that new. Professor Schwartz, I found, suggested such a requirement in a dissenting statement in the 1955 report of the Attorney General's committee studying the antitrust laws, and that it also was one of the recommendations of the 1959 report of the House Antitrust Subcommittee on the Department's consent decree procedures. I think it is worth quoting that statement where that report said:

When the Department of Justice presents a consent decree to the court for its approval, it should be accompanied by a statement that sets forth the facts involved, the defendant's position, the meaning of the provisions used in the

decree, and the reasons that form the basis for the Department's acceptance of the particular compromise. The necessity to make such a statement should go far to insure against arbitrary action in the consent disposition of antitrust litigation.

It is also interesting to note that in a different statutory context, section 1329 of title 8 of the United States Code requires that the reasons or the settlement of various immigration and naturalization suits must be disclosed and made a matter of record.

I think my only suggestion with respect to this provision of the bill is that it might expressly require that the Department's statement include an explanation of any respects in which the proposed judgment differs from the prayer for relief, or does not clearly respond to the allegations of the complaint.

It is my understanding that the requirement for such an explanation is presently part of the internal procedures of the Federal Trade Commission. It is required when the staff of the FTC submits a proposed decree to the Commission for its approval.

At the same time, I think the bill's requirements, which have been discussed this morning, for a description of the remedies available to potential private plaintiffs, the procedures available for modification, and a description of alternatives, really could be eliminated.

It seems to me these are well enough known—at least the first two are well enough known—to interested parties, or to their lawyers. As to the one about alternatives, I must say I am not quite sure of what that means. If it really means talking about all the other possible things the decree could require, it seems to me that would add substantially to the burden involved.

As to the other sections, I think the section of the bill which provides for consideration and response by the Department with regard to the comments of others is obviously an appropriate supplement to the requirement for the public impact statement, since it will make sure that the Department considers and responds to the expressed concerns of all parties and not simply to the things that occur to it when it files its initial statement.

The remaining section of the bill, which relates to the greater public exposure of the consent decree process, would require the filing with the court of a description of all written and oral communications, other than by counsel of record, by or on behalf of the defendant with any Government official in the consent decree process.

This provision, I think properly refrains from seeking to prohibit such communications since they are appropriate and, in fact, do serve a valuable function in some cases.

Other agencies of the Government sometimes possess special knowledge concerning an industry or the practices concerned, and there is surely no reason why they shouldn't be urged to communicate this kind of information to the Department.

In addition, by excluding contacts made by counsel of record, this provision of the bill properly declines to require a burdensome intrusion into all of the many routine contacts which are a necessary and essential part of consent decree negotiation. My only comment or suggestion concerning the drafting of this part of the bill is that the requirement for the recording of contacts by officials of the company with the Justice Department could well be deleted. In the normal, routine negotiating process, representatives of the company very often

accompany counsel of record in what is often a long series of meetings, and I see no particular reason why those routine contacts pose any threat or need to be recorded. But with this exception, I don't see why communications with other branches of the Government concerning a proposed decree shouldn't be recorded, and I don't think that the requirement that they be recorded will inhibit communications of this kind when, in fact, they are appropriate.

The one reservation I think should be expressed concerning the public impact statement is that unlike the previous witness, I do think it would impose a substantial burden on the Antitrust Division. This is not an ordinary pleading. These explanations really will be announcements of the Division's policy, and I think, as I have said, that this is as it should be. This is a useful function that they should perform.

But where statements are going to be taken as official statements of policy, I know from experience that a great deal of time and effort is going to go into their preparation.

One analogy I think of is the requirement that the Department comment on all bank mergers. I know that doesn't appear that big a burden when you first look at it, but it has required a substantial amount of time that a lot of people in the Department would rather spend doing other things. This is because the Department takes its responsibilities seriously, and tries to be sure that its comments are responsible and consistent and that they provide guidance to the public and to members of the bar.

And so I think a great deal of work at the highest level of the Division is going to go into this. I don't think that is a reason for rejecting the proposal. In fact, I think will be effort well spent, but I think that the Congress ought to relize the effort is going to be there, and that it ought to be taken care of in the appropriations that are provided for the operation of the Division.

Senator TUNNEY. Now, just on that point, how many years did you serve at the Antitrust Division of the Justice Department?

Mr. HAMMOND. I served in the Division from 1956 to 1961, and then I served in the Federal Trade Commission until 1965, and then, again, in the Antitrust Division from 1965 to 1969.

Senator TUNNEY. Thank you.

STATEMENT OF JAMES S. CAMPBELL, ATTORNEY

[Mr. Campbell's prepared statement follows:]

STATEMENT OF JAMES S. CAMPBELL ON S. 782, THE ANTITRUST PROCEDURES AND PENALTIES ACT, MARCH 15, 1973

I am happy to respond to the invitation of the subcommittee to state my personal views on S. 782, the proposed Antitrust Procedures and Penalties Act. My appearance today is as an individual, but I wish to have the record reflect that I am an attorney presently engaged in the private practice of antitrust law and, more specifically, in the negotiation of consent settlements of government antitrust cases. Accordingly, I represent clients who might be affected by and have an interest in the provisions of this bill. While in my judgment this representation does not prevent me from making at this time an objective statement of my personal views concerning the bill, that is a matter which the subcommittee can and should properly determine for itself, in light of whatever intrinsic merit my statement may have.

In the first place, I would like to state my agreement with the views that have just been expressed by Mr. Hammond. I believe that the objectives of S. 782 are

worthwhile. Public confidence in the process of consent decree negotiation, and the quality of that process, can be strengthened by requiring a public statement by the Department of Justice of the basis for the settlement, by providing for a more careful consideration of the interests of third parties, and by disclosing relevant non-lawyer contacts by the consent decree defendant with Governmental officials.

These requirements are certainly the heart of the bill, as Mr. Hammond has indicated. I suspect that these hearings will reveal rather less disagreement over the basic merits of these requirements—though some of them will surely be controversial—and rather more disagreement over the sections of the bill that attempt to define the proper role of the courts in the consent decree process. These are sections 2(d), (e) and (g), and it is principally to these sections that I intend to address my prepared remarks this morning.

The "court provisions" of the bill are obviously designed to facilitate judicial supervision of the consent decree process without undermining the ability of the Government to achieve its antitrust enforcement objectives by settlement rather than by trial. Thus Section 2(d) requires that before entering a consent decree, the court shall determine that the decree is in the public interest. Section 2(e) sets forth a variety of procedures through which the court can apprise itself of the facts necessary to make the public interest determination, while Section 2(g) makes it clear that none of this fact-gathering will have the effect of turning the consent decree into evidence of guilt in subsequent private treble damage litigation.

In analyzing these provisions, I would begin by noting that these court provisions of the bill are closely related to the proper functioning of the provisions relating to the Department's impact statement and to the defendant's disclosure of contacts. Obviously, the realization that the court, in making its public interest determination, will review the impact statement will tend to encourage the Justice Department to prepare a careful, accurate statement, with the benefits that will flow from that effort. If there were no judicial role in the consent process at all, the impact statement could well become a *pro forma* exercise of little value.

The second point to be made in this connection is that it is well established in the case law that the entry of a consent decree is a judicial act, and not merely the execution of a private contract between two adversary parties. That teaching goes back at least to the Supreme Court's decision in *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). It has also been clear for nearly as long that the court should perform the judicial act of entering an antitrust consent decree only if it believes that the settlement is, in the words of a 1942 District Court decision, "equitable and in the public interest." *United States v. Radio Corporation of America*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). So the idea, reflected in Section 2(d) of the bill, that the court has a role to play in seeing that antitrust settlements are in the public interest, is a concept that has considerable precedent supporting it.

Now what is less clear from the decided cases is just what factors the court should take into account in making its public interest determination and how it should go about getting the facts that it believes are relevant. The difficulty here stems from the fact that the court's role in approving consent settlements is, in the nature of things, a sharply limited one.

The limitations on the court's role arise from the fact that the court can go only so far in second-guessing the Justice Department's determination that the proposed settlement is a good one. In 1937, Donald Turner, then assistant attorney general for antitrust, succinctly stated the principal factors which motivate the Antitrust Division in consent negotiations: "While we consider it our principal concern to secure effective and rapid relief at the least cost in enforcement resources, we also consider factors such as the effect of the decree on treble damage plaintiffs; the culpability of the defendants; the need for speedy relief; the likelihood that trial would afford additional desirable relief; the effect that consent to the decree might have on similar cases; and, of course, the strength of our case on the facts and on the law." (Letter to Senator Gaylord Nelson, Nov. 10, 1967.)

Now it is clear that some of these factors—such as the degree of the defendant's culpability and the strength of the Government's case—are matters that simply can't be probed by the court without a full trial, and yet these factors may be a vital part of the Justice Department's determination to enter into the

particular settlement. (Another relevant factor that the court can't fully assess is the impact of settlement *vel non* on the Department's allocation of enforcement resources.) If the court attempts to get into these matters very deeply, it may end up having a kind of mini-trial and delaying the settlement to the point where the need for speedy relief—another relevant factor—is largely frustrated.

And, of course, looming very large at all times is the twin fact that the court can neither compel the Government to prosecute its case nor force the defendant to consent to any particular settlement. Nor can would-be intervenors complaining about the decree make the Government go forward or the defendant capitulate. If the court rejects a proposed consent decree, it cannot control what will be substituted for it. This is a fact of life that the courts will always take into account in reviewing consent decrees, and Section 2(d) ought to be drafted with this basic consideration in mind.

Having pointed out some of the limits on the court's role in the consent decree process, let me now try to state more affirmatively what the courts can do in furtherance of the public interest. I would put these affirmative duties of the court under three headings.

The first, to which I have already alluded, is the court's duty to insure that the Department of Justice makes an adequate disclosure to the court of the considerations that have led it to propose the particular consent settlement. This is really a procedural function, because, as I have indicated, the court can't properly second-guess the Department as to many of these considerations. But still the court can, by requiring adequate disclosure, at least make sure that the Department's decisional processes are of sufficient quality and integrity to bear public consent settlements that are in fact in the public interest.

At the present time, the courts do not normally require disclosure of the considerations leading the Department to settle antitrust cases, as is indicated by the recent Supreme Court affirmance of Judge Blumenfeld's decision in the ITT-Hartford case, in which he held that the Justice Department was not under a duty to disclose that ITT's "hardship" claim was a motivating factor in the Department's willingness to enter into settlement negotiations. *U.S. v. ITT Corp.*, 1972 Trade Cases ¶ 74,152 (Sept. 7, 1972), *affirmed sub nom. Nader v. United States*, — U.S. — (February 20, 1973). I take it that the intent and effect of S. 782 is to change this kind of result.

The second area in which the courts have an affirmative role to play in the consent decree process relates to the impact of consent settlements on the economic interests of third parties. Here I do not refer primarily to potential treble damage plaintiffs who typically wish the government to litigate rather than settle, even where some definite relief now is clearly more in the public interest than incurring the risk that at a later time, after an unsuccessful trial, the government will obtain no relief at all. While it may be argued that the court should consider the interests of private plaintiffs, it would certainly be the most unusual case indeed in which the court would refuse to let the Department of Justice enter into an otherwise adequate consent decree merely because a litigated judgment for the Government would be of more benefit to potential damage plaintiffs.

Instead, in referring to the impact of a consent decree on the economic interests of third parties, I mean to point out that the injunctive and divestiture provisions of a consent decree can substantially affect the economic interests of suppliers, customers, competitors and even employees of the consenting defendants, and that accordingly these interests should properly be considered by the court in considering whether a proposed decree is in the public interest. For example, in the Blue Chip Stamp case brought against the stamp company and its backers, the court withheld its consent from a proposed decree after considering the effects that the relief provisions of the decree would have on smaller retail stores using the stamps. See *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 434 (C.D. Cal. 1967), *Affirmed sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968). In the LTV-Jones & Laughlin case, the court approved a consent decree permitting the challenged take-over only on condition that certain safeguards were erected to protect the beneficiaries of the J&L employee benefit and pension funds. *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970).

As these cases indicate, some courts are already sensitive to third party interests in the consent decree context. But the bill can do a valuable service by reaffirming the court's obligation to consider third-party interests and by provid-

ing the mechanisms for adequate factual development before the court. Section 2(e) of the bill (in conjunction with section 2(g)'s exemption from the prima facie evidence provision of the Clayton Act) is obviously designed to serve this latter purpose. In my view, however, it goes too far in inviting the court to permit full intervention of third parties in Government antitrust litigation, with the attendant danger that they will thereby obtain an effective veto power over the Government's conduct of the litigation—or, at the least, the ability to delay settlement through skirmishing before the trial court and subsequent resort to the appellate courts. Normally *amicus* status will suffice for third parties, and when some third-party evidentiary presentation is desired by the court, the third party intervention should be strictly limited to the purposes for which the court has determined intervention is desirable.

The third situation in which the court has a significant affirmative role in the consent decree process is when the provisions of the proposed settlement deviate in a truly gross way from the relief sought in the Department's original complaint. In this unusual situation the court's role may go beyond the merely procedural function of requiring the Government to explain what happened; in such a case, hearing no satisfactory explanation, the court may well have to make the substantive determination that the public interest would be better served by its refusing to accept the settlement at all, even when the possible consequences of that refusal are fully borne in mind. Perhaps the best way to discuss this aspect of the court's function in consent decrees is to take an actual illustration—the famous AT&T-Western Electric decree entered in 1956 and intensively investigated by the Congress between 1957 and 1959.¹

In 1949 the Justice Department charged AT&T and its subsidiary, Western Electric, with monopolizing the manufacture and sale of telephone equipment in violation of the Sherman Act. The suit was based on a four-year FCC investigation specifically authorized by Congress, and the basic relief sought was the separation of Western Electric from AT&T and its dissolution into three competing manufacturing concerns. In 1956 the suit was settled with no divestiture and without several other major forms of relief that had originally been sought, such as a requirement of competitive procurement of equipment by AT&T. The primary relief obtained related to compulsory licensing of Bell System patents.

The Antitrust Subcommittee of the House Judiciary Committee concluded after investigation in 1959 that in entering the consent decree the government had abandoned "what was at the heart of its case, namely, the AT&T-Western Electric relationship and the effort to sever Western Electric from the Bell System or otherwise limit its role as a virtually exclusive supplier to the system." (Subcommittee Report, p. 39) The subcommittee regarded the decree as "devoid of merit" and as a "blot on the enforcement history of the antitrust laws." (*Id.*, pp. 290, 293).

Now let us suppose that the court to which the consent decree was presented for approval had examined the decree with more rigor than it evidently did, and had reached a conclusion as to its merits similar to that of the House subcommittee. In that event, it should have refused to approve the decree.

The result of that disapproval might have been further consent negotiations and a better decree. On the other hand, the case might have gone to trial and been either won or lost by the Government. If won, then the original theory of the Government would have been vindicated and more adequate relief would have been available without the need for the defendant's consent. If lost, then the Government would not have been entitled to any relief—even the weak relief that would have been obtained in the rejected consent decree—and by definition the public interest would not have suffered.

The third possible outcome of judicial disapproval of the decree is that the defendant refuses to re-enter consent negotiations and the government declines to prosecute further. In that event, the court should dismiss the action without prejudice, as Rule 41 of the Federal Rules of Civil Procedure appears to empower it to do. If this happens, there will be no relief at all, but likewise there will be no consent decree to establish a legal and practical obstacle to prevent a future Attorney General, with different ideas about antitrust enforcement, from bringing a new action based on the same theory as the original one and perhaps

¹ *U.S. v. Western Electric Co.*, 1956 Trade Cases ¶ 68,246 (D.N.J.); Report of the Antitrust Subcommittee, House Committee on the Judiciary, 86th Cong., 1st sess., Consent Decree Program of the Department of Justice (Comm. Print 1959).

getting more effective relief. If the subcommittee's view of the merits of the AT&T-Western Electric consent decree was correct, as we have assumed for purposes of this discussion, then the public interest would be better served by keeping this option open and sacrificing the inadequate relief in the consent decree, rather than embracing the decree and raising a permanent umbrella of antitrust protection over the fundamental AT&T-Western Electric relationship. (Interestingly, the subcommittee found that while counsel for AT&T would have been happy with the dismissal that had been suggested by some Antitrust Division staff members who were opposed to the settlement, counsel also indicated that they *preferred* the proposed settlement to a dismissal without prejudice. See subcommittee report at 90.)

These, then, are the three principal areas in which I think the courts have an affirmative role to play in the consent decree process. From my remarks you will see that I think S. 782 is headed in the right direction on this issue, but that the court provisions, particularly sections 2(d) and (e), can and should be considerably refined so as to provide more careful guidance to the judiciary in the exercise of its affirmative responsibilities.

The House Judiciary Subcommittee, in the report that I have referred to, described the consent decree process as moving in "an orbit in the twilight zone between established rules of administrative law and judicial procedures." (p. 15) That is where, because of its subtlety and complexity, consent decree practice will always be. But the implied rebuke contained in the subcommittee's use of the term "twilight" is one that is undeserved in the overwhelming majority of cases, where the consent decrees that are obtained are in fact in the public interest. S. 782, with appropriate refinements, can let in some sunlight and, by helping to prevent the occasional miscarriage of justice, bolster confidence in a basically sound process that comes to general public attention only when something goes seriously wrong.

Mr. CAMPBELL. Thank you, Mr. Chairman.

To begin, I would like to state that I do agree with the views that have been expressed by Mr. Hammond with regard to the public disclosure provisions of the bill, and these requirements are certainly the heart of the bill, as Mr. Hammond has indicated.

Also important, however, are sections 2(d), 2(e), and 2(g), which are what I call the "court provisions" of the bill. It is principally to these sections, the court provisions, that I would like to address my remarks this morning.

In analyzing these provisions, I would begin by noting that they are closely related to the proper functioning of the provisions relating to the Department's impact statement and to the defendant's disclosure of contacts. Obviously, the realization that a court, in making its public interest determination, is going to review the impact statement will tend to encourage the Justice Department to prepare a careful, accurate statement, thereby securing the benefits that will flow from the effort, as described by Mr. Hammond.

The second point to be made in connection with the court provisions is that it is well established in the case law that the entry of a consent decree is a judicial act, and not merely the execution of a private contract between two adversary parties. So the idea reflected in section 2(d) of the bill, that the court has a role to play in seeing that antitrust settlements are in the public interest, is a concept that has considerable precedent supporting it.

But what is less clear from the cases is what factors the court should take into account in making its public interest determination and, perhaps most acutely, how it should go about getting the facts that it believes are relevant to the determination.

The difficulty here stems from the fact that, as Mr. Hammond has pointed out, the court's role in approving consent settlements is, in the nature of things, a very limited one.

In the first place, the court can only go so far in second-guessing the Justice Department's determination that a proposed settlement is a good one. Some of the factors that properly enter into the determination by the Government to settle the case, such as the degree of the defendant's culpability and the strength of the Government's case, are matters that simply can't be probed by the court without a full trial, and yet these factors may be a vital part of the Justice Department's decision to settle.

If the court attempts to get into these matters very deeply, it may end up having a kind of mini-trial and delaying the settlement to the point where the need for speedy relief—which is, of course, another factor which the Government considers—is largely frustrated.

And looming perhaps largest of all is the double fact that the court can neither compel the Government to go forward and prosecute its case nor can it force the defendant to consent to any particular settlement. That is also true of would-be intervenors who come in and complain about the decree. If the court rejects the proposed consent decree, it cannot control what will be substituted for it. This is a fact of life that the courts will always take into account in reviewing consent decrees, and it might be useful if section 2(d) of the bill at least nodded in that direction in setting forth the factors which the courts should consider.

Now, as against these limits on the court's role in the consent decree process, there are areas in which the court does have an affirmative role, and I put those basically under three headings.

The first, to which I have already alluded, is the court's duty to insure that the Department of Justice makes an adequate disclosure to the court of the considerations that have led it to propose a particular consent settlement. This is essentially a procedural function and a very important one.

The second area in which the courts have an affirmative role to play in the consent decree process relates to the impact of consent settlements on the economic interests of third parties. Here I don't refer primarily to potential treble damage plaintiffs, who typically wish the Government to litigate rather than settle, but I mean instead to point out that the affirmative injunctive and divestiture provisions of a consent decree can substantially affect the economic interests of suppliers, customers, competitors and even, in the rare case, the employees of the consenting defendant. Accordingly, these interests should properly be considered by the court in its determination as to whether a decree is in the public interest.

Now, the *Blue Chip Stamp* case, which was mentioned by an earlier witness, involved a Sherman Act case brought against the stamp company and grocery chains which had formed the company, and the court withheld its consent from a proposed decree in that case, after it had considered the effects that the relief provisions of the decree would have on smaller retail stores which used the Blue Chip Stamps. Ultimately, a satisfactory settlement in that case was worked out and it was entered by the court.

Now, as cases like this indicate, there are some courts that are already sensitive to third party interests in the consent decree context. But I think the bill can do a valuable service here by reaffirming the court's obligation to consider these interests, and by providing the mechanisms for adequate factual development for the court. These provisions are principally contained in section 2(e) of the bill.

Here I feel that I should point out that the sections dealing with the possibility of full intervention by third parties seem, to me, to go too far. While it is valuable to specify for the court and give it guidance as to the nature of the participation and the nature of the factual development which it can have, I think that this should be restricted, in the normal case, to amicus participation, or, in the situation where the court wishes factual development, to a limited intervention by a party desiring to put on testimony or to introduce evidence.

I am afraid that if you broaden it beyond that, you run the risk of providing third parties with an effective veto power over the conduct of the litigation, and you invite delaying appeals. I think the bill would be much better advised to go in the direction of authorizing the court to have strictly limited intervention in the situations where the court feels that that is desirable.

The third situation in which a court has a significant affirmative role in the consent decree process is when the provisions of the proposed settlement deviate in a truly gross way from the relief sought in the Department's original complaint. In this situation, the court's role can properly go beyond the procedural function of requiring the Government to explain what has happened. In this case, if the court hears no satisfactory explanation, it may well have to make the substantive determination that the public interest would be better served by its refusing to accept the settlement at all, even when the possible consequences of that refusal are fully borne in mind.

In my prepared remarks, I discuss at this point at some length the A.T. & T.-Western Electric decree which was entered in 1956 and was intensively investigated by the Congress between 1957 and 1959. My point is that if a court had reached the same conclusion about the merits of that decree that the House Antitrust Subcommittee did, the public interest would have been better served by the court's refusal to enter that decree, even when one considers the various possibilities that could flow from that refusal, such as, for example, the Government's refusal to go forward and the defendant's unwillingness to enter into any other decree.

In that instance, what should be done by the court is to dismiss the case without prejudice, which would have the effect, admittedly, of sacrificing the relief that was obtained in the decree, but on balance, given the inadequate nature of that relief—if the subcommittee's view is correct—it would be better to forgo that relief rather than to embrace the decree and raise a permanent umbrella of antitrust protection over the fundamental A.T. & T.-Western Electric relationship which was challenged in the suit.

These are the three principal areas in which I think the courts have an affirmative role to play in the consent decree process, and from my remarks you will see that I think S. 782 is definitely headed in the right direction on this issue. But the court provisions—particularly

sections 2(d) and (e)—can and should be refined so as to provide more careful guidance to the judiciary in the exercise of its affirmative responsibilities.

The House Judiciary Subcommittee, in the report that I have referred to, described the consent decree process as moving in "an orbit in the twilight zone between established rules of administrative law and judicial procedures," and that is where I think, because of its subtlety and complexity, consent decree practice will always be. But the implied rebuke contained in the subcommittee's use of the term "twilight" is one that is undeserved in the great majority of cases, where the consent decrees that are obtained are, in fact, in the public interest. S. 782, with appropriate refinements, can let in some sunlight, and by helping to prevent the occasional miscarriage of justice that does occur, it can bolster confidence in a basically sound process that comes to general public attention only when something has gone seriously wrong.

Thank you.

Senator TUNNEY. Well, I want to thank both of you for the very careful and educated statements that you have made, a very sophisticated approach to the legislation, and the committee deeply appreciates the time that you have taken to view and analyze the bill and give us the benefit of your expertise.

Mr. Campbell, how many years did you serve in the Antitrust Division of the Justice Department?

Mr. CAMPBELL. I served only 1 year. I was special assistant to Donald F. Turner during a portion of the time when he was the assistant attorney general in charge of the Antitrust Division. As my statement indicates, the bulk of my private practice has also been in the antitrust area.

Senator TUNNEY. How many years have you been in the antitrust field?

Mr. CAMPBELL. Approximately 8.

Senator TUNNEY. Mr. Campbell, how do you react to Mr. Hammond's statement that the consent decree provisions would constitute a burden on the Antitrust Division?

Mr. CAMPBELL. I would agree with him on that. And, as he pointed out, it is a burden that ought to be assumed. But when I was in the Antitrust Division, I was responsible for drafting, in the first instance, and trying to keep the project moving forward, the merger guidelines that were issued by Assistant Attorney General Turner, and I know from that experience that when a Government enforcement body tries to make a considered statement as to what it is doing, it is a time-consuming process, requiring hard thinking and careful attention by all that are involved.

Now, obviously, an impact statement in connection with a particular litigation does not pose anything like the burden that the effort to make a comprehensive statement of merger policy does. But, on the other hand, there are enough similarities there so that I would say, from my experience, that this will require additional time from the best attorneys in the Antitrust Division, particularly at the higher levels.

The result, as Mr. Hammond has pointed out, will be that when the Division acts, it will act on a rational basis. I think we both share the

fundamental view that antitrust is a rational enterprise, and if that is true, one ought to be able to state why one is doing what one is doing, and it is a valuable exercise to attempt it, even if it is time consuming and burdensome.

Senator TUNNEY. Of course, it is difficult to evaluate how great an additional burden that would be, and I suppose that it could be said that any change in law in the present consent decree provisions or modus operandi would constitute a burden.

Mr. CAMPBELL. Yes, that is quite true. One of the outcomes of the A.T. & T.-Western Electric experience was the Department's voluntary institution of a procedure whereby there was a 30-day waiting period between the time the consent decree was filed with the court and the time that it was approved, and during this period public comments could be made. And as I have suggested through some of these case citations here, there are often hearings held before a court in which parties argue over the public interest in the decree. Now, these procedures have added to some extent to the burden of the Antitrust Division, and yet I think one would be very hard-pressed at this point in time to find anyone who thinks that that 30-day waiting period is not a desirable feature of antitrust enforcement.

Senator TUNNEY. And I would assume that you also believe from your experience in the Department, from what you just said, that there ought to be an increase in budget of the Antitrust Division.

Mr. CAMPBELL. Yes, very definitely. That is sort of another subject, but I think there definitely should be an increase in the budget. I also think there should be revisions in the salary grade levels that are available for senior trial attorneys, and I think that there are a number of extremely constructive things that could be done here, both by the executive branch and perhaps by the Congress as well.

Senator TUNNEY. As I recall, the budget is about \$12 million. I recall last year trying to get an increase of about \$2 million and, unfortunately, as a result of some procedural problems on the floor of the Senate, I was foreclosed from offering that amendment.

However, I intend this year to pursue that interest because I feel that the Antitrust Division has a desperate need for additional funds.

Mr. CAMPBELL. Back in the days when I was in the Division, I engaged in the process of program planning and budgeting in which, on the Pentagon model, one attempted to discover how big a "bang" one would get for one's "buck" in a particular kind of governmental activity, and I thought the Antitrust Division was able to make a very stunning demonstration of the benefits in terms of its enforcement activities, so far as reducing inflated prices and eliminating anti-competitive practices that tend to cost the consumer money and damage the economy.

Senator TUNNEY. There have been suggestions that we ought to differentiate between different types of cases in the consent decree provisions of the bill, with the important cases perhaps being subject to the language contained in the bill, but less important cases should not be, that there should be some kind of a "trigger" mechanism.

Do you have any thoughts that you could share with us on that particular point?

Mr. HAMMOND. I really don't see how that is feasible. I don't know any easy test for the importance of a case.

You may find a price-fixing case against very large defendants that is completely unimportant as a matter of antitrust policy or of the legal doctrine that is involved in the case. On the other hand, you may find a case involving relatively small defendants in a new and developing area of patent licensing or distribution which is extremely important. Now, who would make that judgment or how would it be made?

I think that, going back to the point of burden which I guess is what this relates to, I wouldn't want to overstate it. There will be a lot of consent cases where the relief in the consent decree is fairly routine; it will fall into a pattern, and it will be like the relief that has been accepted in a number of other cases. Those, I think, really are your unimportant cases, and I think the burden on the parties, the courts, and the Department, in those cases, will be very minimal.

So I think that the sorting out of the important from the unimportant is going to take care of itself, and doesn't require any language in the bill.

Senator TUNNEY. Mr. Hammond, I have a question with regard to your testimony:

That the bill's requirements that the Department's statement include a description of the remedies available to potential private plaintiffs, procedures available for modification of a judgment, and a description and evaluation of the alternatives to the proposed judgment might well be eliminated.

You go on to state that:

These matters should be well enough understood by the affected parties, or at least by their lawyers, and their inclusion unnecessarily adds to the burden which the requirement imposes on the Department of Justice.

But isn't it also true that it is important that these matters be understood by persons not intimately involved in a case? And if they are understood by the parties, that the burden would be minimal?

Mr. HAMMOND. Well, you may well be right. I think there are really two thoughts involved here that are perhaps compressed a little too much.

With regard to the remedies available to potential plaintiffs and procedures for modification, I have to agree that is not very burdensome to state, but I continue to think it is relatively meaningless.

I think most businessmen—they would be the people normally bringing private actions—after they gave it their first thought, their next move would be to call their lawyer and I think they would find out very quickly what the provisions are, so I can't say I feel very strongly on either side of that proposition.

On the alternatives, I am more troubled, partly because there may just be a lack of understanding on my part, but I am not quite sure what is meant there. If it means digging into all the other possible kinds of relief you might have had, that strikes me as quite burdensome and speculative and of rather marginal benefit.

Maybe I am missing something on that.

Mr. CAMPBELL. I would like to add to that, particularly on the alternatives thing.

I take it the model here is the National Environmental Policy Act, and as you well know, the generality of that statute has been productive of a lot of judicial spinning out of what its requirements mean

and, in the area of alternatives, this has been a particularly vexed problem. Some courts have suggested that the agency has a duty only to consider reasonable alternatives, and then in other situations, one is not quite clear what those alternatives are.

In view of the fact that the Government and the defendant have arrived at a particular consent settlement and that is what is being presented to the court, and in view of the fact that you can expect to have third parties coming in and saying, "Well, they should have done it this other way," and in further considering the very wide range of alternatives that are at least logically possible in any particular settlement, I think it probably would be better on whole to delete this section, rather than——

Senator TUNNEY. Well, the only thing is to point out there is no intention to require the Department to develop all kinds of exotic theories, such as one might expect on a bar exam or in a law school in answer to a question or a test. That was not the intent.

Mr. CAMPBELL. Well, I think NEPA indicates the difficulty that you run into when you put in a provision like this. What may be appropriate in an area of as grave concern as there is so far as environmental policy is concerned, where you have a record of the whole governmental and private competitive system inadequately valuing environmental factors, what is appropriate there may well not be appropriate in a process that has a greater history behind it and does not present the kind of acute situation that the environmental field does.

I really think that if this bill were to produce the kind of delay which you do have in many NEPA situations, it would not be well. You will frustrate an important benefit of consent decrees to the extent that you allow third parties to get courts started down a road that results in substantial delay in the entry of the decree.

Senator TUNNEY. Well, there are a number of other questions that could be asked on that whole area of whether or not we should be informing only attorneys, or whether we should be informing the public as well.

The public may not be as adequately versed in legalisms and the legal language as is needed to evaluate what has been done, but I have some other areas, and we have a limitation of time, and if you feel an urgent desire to make your views known on that area, please submit it for the record later on.

But I would like to get into some other areas because I have other appointments that I have to be leaving for in a few minutes.

Mr. Campbell, on page 10 in the New York report, a point is made that 2(d) should be struck, since it would encourage the court to consider irrelevant, extraneous issues. This is in contrast to your statement in your testimony, in which you said such issues have and should be considered, for example, an issue such as an employee's rights, economic interests of suppliers, et cetera.

In light of your testimony, could you comment on that aspect of the testimony offered by the New York Bar representatives?

Mr. CAMPBELL. Well, if they are saying that section 2(d) should be stricken in its entirety, I fail to understand that. The first sentence of it I take to be nothing more than a statement of the existing law which goes back, well, some 40 years, or at least nearly that far, and I cited

some of the cases in my testimony which say that a court has a duty in entering a consent decree to determine that it is in the public interest. The decree is a judicial act. The provisions of it will be enforced by the court, with the contempt power, and it is not something that a court should enter unless it is satisfied that it is in the public interest.

Now, if the point of the Bar Association is that the statement in the remainder of paragraph (d), as to the factors that the court should consider, is not quite right on the mark, then I would agree with that. I would say, however, that it would be valuable for the bill to specify the factors that the court should keep in mind, not in an exclusive way, but in an illustrative way, and if the bill were to do so, I have suggested in my testimony that there might be some additions and deletions in the particular factors that are mentioned. But I regard section 2(d) as an important part of the bill.

Senator TUNNEY. Thank you.

Mr. Hammond, in your statement, you indicate that the requirement for publication of the purpose of the proceeding, the anticompetitive practices, involves any anticipated effects of the belief, making it more difficult for the Department to justify a weak decree and provide a basis on which the court will decide whether acceptance of the decree is in the public interest.

Now, as I understand the present situation, the Department theoretically could enter a decree that would not remedy the practice complained of, and this decree, in all probability, would be accepted by the court. Is this correct?

Mr. HAMMOND. I think it is possible. I think it is a very rare occasion.

Senator TUNNEY. Well, part of the criticism of consent decree proposals has been that they would force the Government to abandon truly weak cases, cases in which the Government has made the mistake of proceeding.

It seems to me it might be a worthwhile effort to do this. What is your reaction?

Mr. HAMMOND. I think it ought to. I think that is a desirable consequence. Where the Government decides, as it occasionally does, that it has made a mistake, that on reconsideration it shouldn't have brought the case, I think it is far better—it is both fairer to the parties and it avoids misleading the other businessmen and the bar—to admit it and dismiss the case.

Certainly, that is far better than accepting a weak decree which is unfair, which still stigmatizes the people that accepted it, and which at the same time is going to be cited back at the Department as precedent.

I think one of the valuable functions that this bill would perform would be to avoid that.

Senator TUNNEY. You indicate that the requirement to include description of remedies, procedures, and modification and description and evaluation of the alternatives to the proposed judgment could be eliminated.

Now, I can understand the reasoning with respect to the remedies available portion, since perhaps an innovation could be obtained under the section requiring response to inquiries.

However, with respect to the other two requirements, I am wondering if this information is necessary for the court in order to fully evaluate what proposals are in the public interest.

Mr. HAMMOND. You mean the provisions—would it be necessary to state the provisions for later modification?

Senator TUNNEY. Yes, sir.

Mr. HAMMOND. Well, I don't have a strong feeling on that. I think that is a legal question that is normally known to the court. I have no strong feeling about whether that is included or not.

Senator TUNNEY. Mr. Campbell, you have argued in your testimony that, normally, amicus status would suffice for third parties. Well, S. 782 does not require the court to allow intervention.

In fact, on any particular status, the judge might decide simply to authorize amicus status or he might authorize greater participation if he determines that is appropriate.

Don't you feel that the legislation should provide them with a range of alternatives and suggest several possibilities?

Mr. CAMPBELL. My difficulty, as I indicated earlier, is with the provision for full intervention. As I understand existing law, the only instances in which private parties have been allowed to intervene in Government litigation are essentially one or two cases in which it was thought to be necessary to secure compliance with the mandate of the Supreme Court—this is the *El Paso* case, which was a very strange case in many respects.

I think that the enumeration of these alternatives in the bill, without the bill also reflecting that full intervention is an extraordinarily rare situation, might invite a court to start down a road that would, in the end, be productive of considerable mischief.

Suppose, for example, you allowed a third party to intervene as a full party for the purpose of presenting evidence that the decree is not in the public interest, and he does so, and the court is convinced, and then the court declines to enter the decree. Well, now what happens to that party? He is still in there, I suppose, and he may well decide that he is entitled to take an active role in the trial of the Government's case, if the Government does go to trial.

What I think would be much more appropriate would be that after the court has heard the third party and decided, as we are assuming in this instance, that the decree is not in the public interest, the court should say, "Thank you, Mr. Intervenor, you may now retire to the sidelines and we will let the Government go back to its business." That I think would be definitely your normal way of proceeding where you want to have evidence taken before the court.

And as I have suggested, in many cases—I would think in the large majority of cases—it would be enough for the court to hear arguments of third parties' counsel and decide whether they really look like they are on to something. And then if they are, then consider the question of some kind of evidentiary participation. But until there has been some kind of threshold determination by the court through an amicus presentation, that there was something here that needed to be investigated, then I wouldn't invite the court to get into this kind of thing.

Senator TUNNEY. Well, I want to thank both of you again for being witnesses this morning. It has been very beneficial to me to hear your testimony.

And I would like to submit for the hearing record a letter from Judge A. Sherman Christensen, senior U.S. district judge for the District Court in the District of Utah, which provides some important insights into S. 782, as well as some thoughts and proposals on the general subject by John J. Flynn, professor of law at the University of Utah.

Mr. CHUMBRIS. In view of the time limit, I will have no questions, Mr. Chairman.

Senator TUNNEY. Thank you.

Would you gentlemen be prepared to answer written questions, if any should arise?

Mr. HAMMOND. Certainly.

Senator TUNNEY. To the minority counsel and others?

Mr. HAMMOND. Yes.

Senator TUNNEY. Thank you very much.

The committee will now recess until 10 a.m. tomorrow, March 16. [Whereupon, at 12:50 p.m., the subcommittee adjourned, to reconvene at 10 a.m., the following day, March 16, 1973.]

SALT LAKE CITY, UTAH, February 23, 1973.

MISS SHIRLEY Z. JOHNSON,
Assistant Counsel, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MISS JOHNSON: Reference is made to your letter of February 14, 1973, concerning proposed consent decree legislation embodied in S. 782. I appreciate the opportunity of examining a copy of this bill which you enclosed and may I say that I personally favor its provisions in principle, as you may gather not only from my practice in the Beatrice Foods antitrust suit in the Northern Division of the District of Utah, in which you participated, but from the following action of the Judicial Conference of the United States based upon recommendations of its Committee on the Revision of the Laws of which I was a member at the time:

"Consent judgments and decrees by the Federal Trade Commission and by the district courts in antitrust cases—H.R. 427, 85th Congress, would amend section 4 of the Sherman Act so as to provide that notice shall be published in the *Federal Register* of any proposed consent judgment, decree or order before its entry by a district court or the Federal Trade Commission in a proceeding under the Antitrust Acts or the Federal Trade Commission Act. It was the view of the Committee that the requirements of this bill would provide an improvement in the procedure in such cases which would be very salutary in that it would enable the district court or the Federal Trade Commission, as the case may be, to obtain the views of all persons who might be affected by the proposed decree before it is finally formulated and entered. Upon the recommendation of the Committee, the Conference approved the bill." Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, September 18–20, 1957, taken from Report of the Committee on Revision of the Laws.

"Consent judgments and decrees in antitrust cases.—S. 1337, H.R. 6253, and H.R. 5942 would require that proposed consent decrees in antitrust cases be published in the *Federal Register* at least 30 days prior to their entry. H.R. 5942, which is substantially identical to H.R. 427, 85th Congress, approved by the Conference at its September 1957 session (Conf. Rept., p. 40), would make this requirement applicable to orders entered by a district court or the Federal Trade Commission and S. 1337 and H.R. 6253 would make the requirement applicable also to all consent orders entered by any board or commission for the enforcement of the Clayton Act or the Federal Trade Commission Act. Upon recommendation of the Committee, the Conference approved the proposals contained

in these three bills." Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, September 16 and 17, 1959, taken from Report of the Committee on Revision of the Laws.

"1. The Conference gave its specific approval, to the extent indicated, to the following bills pending in the 87th Congress, which would carry out proposals approved, in whole or in part, at previous sessions by the Conference:

"(d) H.R. 836, requiring that proposed consent decrees in antitrust cases be published in the Federal Register at least thirty days prior to their entry. The requirement would apply to orders entered by a district court and in proceedings by any board or commission for the enforcement of the Clayton Act or the Federal Trade Commission Act (Conf. Rept., Sept. 1959, p. 35)." Report of the Proceedings of the Judicial Conference of the United States, March 13-14, 1961.

It runs in my mind that in addition to these recommendations, another committee of which I am now a member—Committee on Court Administration of the Judicial Conference of the United States—has considered, or now has under consideration, proposed revisions of the Expediting Act designed to reduce the number of government antitrust cases proceeding directly from the district courts to the Supreme Court of the United States. I have asked Mr. William E. Foley, Deputy Director of the United States Courts in Washington, to advise me with respect to any matters that may now be before our Committee for investigation, touching upon the subject matter of S. 782, and any further information in this respect will be transmitted to you. You may desire to speak to Mr. Foley directly with respect to any related action of the Judicial Conference based upon recommendations of our Committees, since he has served as secretary to these Committees. The present Chairman of the Committee on Court Administration is Honorable Robert A. Ainsworth, Jr., United States Circuit Judge, New Orleans, Louisiana.

I shall be out of the continental United States up to the middle of March and will not have an opportunity to further consider the matter. In any event, since our Committee recommendation is either reflected in the official action of the Judicial Conference or on certain aspects may now be scheduled for our consideration, I hope these references will suffice for my views at this time.

Kind personal regards and every good wish.

Sincerely yours,

A. SHERMAN CHRISTENSEN,
Senior United States District Judge.

THE ANTITRUST PROCEDURES AND PENALTIES ACT

FRIDAY, MARCH 16, 1973

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:25 a.m., in room 2228, Dirksen Office Building, Senator John Tunney, presiding.

Present: Senator John Tunney, Senator Edward Gurney, and Senator Roman L. Hruska.

Also present: Peter N. Chumbris, Esq., minority chief counsel; Charles E. Bangert, Esq., general counsel; Meldon Levine, legislative assistant to Senator Tunney; Thomas Farrar, legislative assistant to Senator Gurney; Stanley Hackett, staff of Senator Strom Thurmond; Charles Kern, staff of Senator Fong; Patricia Barrio, and Janice Williams.

Senator TUNNEY. Our first witness is Thomas Kauper, the Assistant Attorney General, Antitrust Division. We are pleased to have Mr. Kauper here with us today.

I would like to apologize to the witnesses, but other matters of importance detained me and I was not able to get up here until now.

STATEMENT OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. KAUPER. I appreciate the opportunity to appear before you today to discuss S. 782, a bill known as the "Antitrust Procedures and Penalties Act."

This bill would, we believe, involve the district courts to a much greater degree in the consent decree process. It could involve inquiry into a variety of matters and in some instances could require a full hearing prior to approval of consent decrees, involving the subpoena of documents and witnesses, and the taking of sworn testimony concerning evidence of the violation alleged in the complaint, the relief to be obtained, the anticipated effects of that relief, the remedies available to private parties, the procedure and standards to be applied for modification of the judgment and the events which might require such modification, alternatives to the proposed judgment and the anticipated effects of the proposed judgment, and any special circumstances giving rise to the proposed judgment or any provision contained therein.

S. 782 might also enhance considerably the standing that private parties would have as a matter of law—as opposed to judicial dis-

cretion—to intervene and to oppose Government settlements. In addition, the bill would require the court to consider the lobbying activities of the defendants as part of the consent decree review.

S. 782 would also increase the penalties to corporations for Sherman Act violations from \$50,000 to \$500,000. Fines levied upon private individuals would be increased from \$50,000 to \$100,000.

Finally, the bill would amend the Expediting Act to require, upon application of the Attorney General, the appointment of a single judge to expedite an antitrust proceeding. The Expediting Act would also be amended to place appeals of antitrust causes which have no special significance in the courts of appeals. S. 782 would permit appeal from a final judgment to go directly to the Supreme Court if: (1) Upon application by a party—or on the district court's own motion—the judge who adjudicated the case enters an order certifying that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice, or (2) if the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

While we have supported certain of these legislative changes in the past, the Department opposes enactment of S. 782 in its present form. In our view the bill will seriously disrupt settlement proceedings in the courts, and would seriously weaken our ability to obtain consent decree settlements from defendants. Even were we able to obtain a meaningful consent decree settlement, under the provisions of S. 782 much of the time of the Antitrust Division's staff would be spent in court litigating what would essentially amount to the merits of the case after the proposed decree was entered. We could expect a marked decrease in our efficiency and in our ability to initiate a broad based national antitrust enforcement in the years to come.

To understand the adverse impact of S. 782, I think it is helpful to analyze current consent decree practices. When we enter into a consent decree, we sign a stipulation with the defendant which provides that the proposed decree shall be entered as final and binding within 30 days after it is filed—with one important qualification, however. The Government reserves the right to withdraw its consent any time during that 30 days. The private party is bound in stipulation and may not withdraw its consent.

On the same day we file the stipulation and proposed decree with the court, we issue a press release advising the public in some detail of the terms of the consent decree, showing what it is designed to do to protect and restore competition. Our press release also describes the illegal action alleged in the complaint. In addition we also alert the public to the Department's consent decree procedure. Under that procedure we invite public comment to the court and to the Department for 30 days prior to the entry of the judgment.

In a number of major cases we have in the past sought leave of the court to appear before it, to explain on the public record the precise manner in which the consent decree is designed to accomplish the purposes of our antitrust suit and to state the basis upon which the consent decree would serve the public interest. There have also been cases in the past in which private parties have appeared on a

limited basis to argue to the court that modifications should be made to the consent decree or that the consent decree should be rejected in its entirety.

Additionally, there have been cases in the past in which, during the 30-day period I have described, private parties have contacted the Justice Department and suggested defects in or amendments to the consent decree. In a number of instances we have agreed with these suggestions and have informed the defendant that unless specific modifications to the decree are accepted by the defendant, we will withdraw our consent. Usually the defendant accepted the suggested modifications.

These administrative procedures have been promulgated as Justice Department regulations. They appear in the Code of Federal Regulations¹. I have attached a copy of the regulations, and I ask that they be incorporated in the record at this time.

Before I discuss specific objections which I have regarding S. 782, I think that it might also be helpful if I set out in rather general form the legal principles which presently govern the appropriate roles of the court and third parties in connection with the entry of consent decrees. Broadly speaking, Congress has charged the Justice Department—the Attorney General—with the duty to protect the public interest in antitrust cases.

Congress did not determine that the public interest would be best protected by the employees of the defendant, by the stockholders or creditors of the defendant, by the suppliers or customers of the defendant, by its competitors or by interest groups—all of whom have from time to time sought to intervene in consent decree proceedings. Each of these groups, after all, has a very particularized interest, an interest frequently far different from that of the public.

Congress determined instead that this crucial law enforcement role should be vested in the chief law enforcement officer of the land—appointed subject to the advice and consent of the Senate—and accountable to the President.² This is recognized by the courts, which have said that it is the “United States which must alone speak for the public interest” in antitrust matters.³

In line with this congressional intent, the courts have held that a nonparty may not intervene in an antitrust action simply to promote his private cause of action.⁴ As a general rule intervention as a party is permitted only where the intervenors can show (a) an interest relating to the subject of the action, (b) that the disposition of the suit may impair their ability to protect that interest, and (c) that their interest is inadequately represented by existing parties. Where the Government has patently failed to protect the public interest, intervention has been granted.⁵ And in several instances, though formal intervention has not been granted, the courts have nonetheless heard, and carefully considered, the arguments of third parties.

The courts do not simply rubberstamp antitrust consent decrees. In entering a decree the courts are called upon to perform a judicial act.⁶

¹ 28 C.F.R. § 50.1.

² *Swift & Co. v. United States*, 276 U.S. 311, 331–32 (1928).

³ *E.g.*, *Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co.*, 269 U.S. 42, 49 (1925).

⁴ *U.S. v. Paramount Pictures*, 1971 Trade Cases ¶ 73,526 (S.D.N.Y.), *aff'd per curiam sub nom. Syufly Enterprises v. United States*, 404 U.S. 802 (1971).

⁵ *E.g.*, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

⁶ *Pope v. United States*, 323 U.S. 1, 12 (1944).

They have a duty to examine the terms of the proposed consent decree to determine whether it should be adopted as the decree of a court of equity. They are required to examine the decree to see whether it is enforceable, whether it provides relief consistent with the prayer of the complaint, and whether on the whole the consent decree is in the public interest.⁷

But except in cases where a previous judicial mandate is involved and the consent decree fails to comply with that mandate, or where there is a showing of bad faith or malfeasance, the courts have allowed a wide range of prosecutorial discretion. The decision to enter into a consent judgment is viewed by the courts as "an administrative decision and is a part of the implementation of the general policy of the executive branch of Government."⁸

Turning now to the proposed bill, S. 782 contains three interrelated sets of provisions dealing with consent decrees. These are (1) the required filing of an impact statement with the court by the Department, a statement which would expand somewhat upon our current press release practice; (2) the required filing by defendants of a statement describing communications between defendant and Government officials; and (3) provisions greatly expanding the roles of the court and third parties in the entry of decrees.

More specifically, section 2(b) of the bill would require the Justice Department to file with the district court a "public impact statement," which would recite, inter alia, the anticipated effects of the relief contained in the proposed judgment; the remedies available to potential private plaintiffs damaged by the alleged violation in the event the judgment is entered; a description and evaluation of alternatives to the proposed judgment; the anticipated effects of such alternatives; and an explanation of any unusual circumstances giving rise to the proposed judgment or any provision thereof.

Section 2(d) provides that before entry of the consent judgment, the district court shall make a public interest determination, and shall specifically consider—

(1) the public impact of the judgment, including termination of alleged violation, provisions for enactment and modification, duration of relief sought, anticipated effects of alternative remedies, and any other considerations bearing upon the adequacy of the judgment;

(2) the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit to be derived from a determination of the issues at trial.

Section 2(f) also provides that each defendant entering into a proposed antitrust consent judgment shall file with the district court a description of any and all written or oral communications by or on behalf of the Department with any officer or employee of the United States concerning or relevant to the proposed consent judgment or the subject matter thereof. In making a public interest determination under section 2(d) the court could, I presume, review the record of lobbying activities by or on behalf of the defendant under section 2(f).

⁷ See *U.S. v. Automobile Manufacturers Association*, 307 F.Supp. 617, 621 (S.D.Cal.), (1969) *aff'd per curiam sub nom.*; *City of New York v. United States*, 397 U.S. 248 (1970).

⁸ The wide range of discretion recognized by the courts thus reflects both a respect for the constitutional separation of powers and the intent of Congress in leaving discretion to the Attorney General in antitrust cases.

The bill also contemplates that the court may hold a hearing on these issues, take testimony of Government officials or expert witnesses and authorize full or limited participation in proceedings before the court by interested persons or agencies.

We believe that these provisions, calling as they do for extensive and rather undefined judicial review of antitrust consent decrees, would seriously disrupt the settlement process, impair our ability to obtain meaningful settlements, delay antitrust relief in cases having direct bearing on the health of our economy, and unnecessarily require the use of Department and judicial resources which might be more fruitfully expended in other ways. Let me be more specific.

First, the overall dimension of the role proposed for the court should be appreciated. Under section 2(d), the court must consider a number of factors, including the anticipated effects of alternative remedies, the effect on private parties, et cetera, factors I will discuss in more detail subsequently. In reaching its decision, the court may take testimony of Government officials, employ consultants, permit intervention, solicit views of other Federal and local agencies and take such other actions as it deems appropriate. These are very broad ranging powers which, when coupled with the breadth of the substantive inquiry to be made, suggest something akin to a full-blown trial. While it may be argued that the proposed inquiry is simply into the adequacy of relief, and not into whether the antitrust laws were violated, such an argument is specious. Disagreement over remedy frequently reflects disagreement over facts. Disagreement over facts requires judicial resolution, and that in turn requires a full evidentiary hearing. The result is likely to be precisely what the consent decree procedure is designed to avoid, the extensive expenditure of Department and judicial resources. Presumably Department resources would be expended not only in representing the United States, but in giving testimony and preparing responses as well.

Let me now discuss several specific features of the bill.

With the bill as written, the court would apparently be required to evaluate and could take testimony concerning the anticipated effects of the relief contained in the proposed judgment. Indeed, this inquiry apparently would encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the Government sought appropriate relief in the complaint itself. We have no objection to explaining to the court the manner in which the consent decree is tailored to achieve the competitive objectives of the relief sought in the complaint. We are concerned that speculation by the Government and the defendant on the anticipated effects of the relief could lead to each side claiming "victory," which could be highly disruptive at a time when termination of the law suit is in the public interest. Any discussion of the long-term effects of a judgment also involves a great degree of "crystal ball gazing." If done in the abstract, the discussion is likely to be useless. To avoid abstraction, detailed facts must be presented to the court. Many of those facts would likely be contested. In the contest, the settlement may be lost in the adversary process. And considerable time and manpower will be expended.

The bill also contemplates that the hearing on a consent decree explore the remedies available to potential private plaintiffs damaged

by the alleged antitrust violation in the event a judgment is entered. Section 5(a) of the Clayton Act⁹ provides that a final judgment in any civil or criminal proceeding brought by the United States under the antitrust laws, which determines that the defendant has violated those laws, may be used as prima facie evidence against the defendant in any claim in any private antitrust action for treble damages. The Clayton Act specifically provides, however, that the Government judgment may not be used as prima facie evidence if that judgment is in the nature of a consent judgment entered before any testimony has been taken.

As the bill calls upon the court to consider the effect of entry of the decree upon individuals alleging specific injury from the violation set forth in the complaint, it is conceivable that a court might feel compelled to deny entry of the judgment on the grounds that so long as no prima facie use can be made of the judgment, the "public interest" requirements of the bill have not been met. In short, a court could require the Department to go to full trial, simply to satisfy the claims of private parties who would naturally wish to avoid the expense of trying their own antitrust cases.

This concern has substantial basis in past experience. From time-to-time private parties have opposed the entry of consent decrees for the reason that if the Department does not go to a final, litigated judgment, the prima facie use of the judgment by private parties in treble damage actions against defendants is lost. Under S. 782 we could well be required by a court to go to full trial.

We have in the past and will in the future continue to oppose such attempts by private parties to force us to continue litigation so that their case can be made out. If the relief we obtain by consent decree is adequate, further litigation would tie up our resources—resources which the Government brings. We, therefore, oppose this feature of the antitrust laws. The courts have consistently upheld our position.

By imposing a requirement on a district court to consider the effect of the consent decree upon private parties, we might be placed in a position of having to engage in endless litigation to obtain the same result which we now reach by consent decree. We do not believe that this portion of the bill is consistent with the public interest in speedy and substantial relief in antitrust cases brought by the Government. And we do not believe it is in the interest of the taxpayer who would be required to support full-blown litigation in virtually every case which the Government brings. We, therefore, oppose this feature of the bill.

S. 782 would also require the court to explore alternatives to the proposed judgment and anticipated effects of such alternatives. The first step would presumably be to identify the alternative remedies. These, in turn, would be evaluated. This exploration could take two forms, both of which we believe would be highly undesirable. First, a court might require the Government to disclose all suggestions which were made by members of the Antitrust Division for relief during the course of settlement negotiations. These negotiations usually involve a number of Antitrust Division personnel, including myself, and all

⁹ 15 U.S.C. § 16(a).

possibilities for settlement are explored in internal staff discussions before we take a position with the defendant. These discussions are, as they should be, very broad ranging and involve assessments of the strengths and weaknesses of our case, the relief which we must have as a very minimum as well as relief which we think the defendant will agree to.

I would strongly object to the disclosure of these staff discussions and recommendations. I believe it would have a chilling effect on the free exchange of information and ideas among my staff and myself. Without that exchange my bargaining position with defendants in consent decree negotiations would be immeasurably weakened. I believe our law enforcement program would be weakened also.

A second possible reaction by a district court would be to explore in some kind of economic atmosphere all possible alternatives to antitrust relief, using Justice Department experts, the experts of other executive branch agencies such as the Commerce Department, the Department of Transportation and the like, and experts brought in by other parties or the court. This exploration could be most expensive, time consuming, and in the end might well bear little relevance to the matters under consideration, resembling a group of highly trained scholars reading their dissertation papers in an almost empty auditorium.

The bill also could require the district court to explore and consider any special circumstances which give rise to the judgment. I believe this provision is much too vague. If enacted, it could permit a "fishing expedition" into prosecutorial discretion in antitrust cases. Such a judicial inquiry could require a trial on the entire range of issues confronting a prosecutor—including the strengths and weaknesses of the Government's theory, the deficiencies in factual proof, the outcome of discovery, the time factor involved in going to trial or getting relief now, the possible relief that might be obtained in light of the risk of litigation, the resources to be committed in this case vis-a-vis alternative—and perhaps more important—cases, and the public consequences of delay in correcting an antitrust violation. The courts do not permit this inquiry now, and I believe it would be inconsistent with both the constitutional nature of the judicial power and the traditional concepts of the adversary process. In the latter sense, I believe that disclosure of these kinds of thought processes in public could force the Government to spell out the strengths and weaknesses of its antitrust program and could give defense counsel an overwhelming advantage in mapping out a case against the Government. I do not believe that result would be in the public interest.

Section 3 of S. 782 would provide for an increase in the maximum fine on corporations from \$50,000 to \$500,000 and for individuals from \$50,000 to \$100,000.

The Department of Justice has asked Congress in the past to increase Sherman Act fines and continues to support such increase.

A primary end of the criminal sanctions of the Sherman Act is to preserve free enterprise by deterring illegal activities and practices preventing effective competition. This end can be met only if those sanctions provide a meaningful deterrent. By current economic standards the comparatively moderate range of fines available under the

Sherman Act is not an effective deterrent to criminal conduct. The maximum fines for individuals and corporations have not been increased since 1955. Since that increase the assets and profits of corporations have increased dramatically, making in some cases the imposition of the present maximum fine only a mild tax on profits available through prolonged violation of the law. To maintain the intended deterrent effect of the maximum fine established in the 1955 amendment to the Sherman Act, an increase is badly needed.

While to relatively small businesses, \$500,000 in fines may seem excessive, many of our cases are brought against some of the Nation's largest corporations. It would stress that it would not be mandatory for the courts to impose the maximum fine. Indeed, courts at present do not often impose even the maximum fine of \$50,000. This judicial restraint is expected to continue. It may reasonably be assumed that the courts will continue to weigh such considerations such as the financial circumstances of the defendant, the nature and duration of the offense, and the effect on the economy.

We believe that the Government's antitrust enforcement will be aided by sharpening industry's awareness of the consequences of a Sherman Act violation. The concern of top management for the financial welfare of their corporations should insure management's direct concern with antitrust compliance at operational levels.

Moreover, increased effectiveness in punishment and prevention would likely be possible with respect to firms smaller in size. The courts have a tendency, in my view, to reserve a maximum or near maximum fine for the largest firms; no matter how grave the violations by the smaller corporations or by individual defendants, their fines tend to be scaled down from this maximum. This often results in virtually meaningless penalties for smaller operations although the conduct involved calls for serious punishment.

We, therefore, support the principle of the increase in maximum fines proposed by S. 782.

Section 4 of the bill would amend the Expediting Act ¹⁰ in a manner virtually identical to that proposed by the Justice Department and submitted to the Congress on July 14, 1969. I have attached the letter of the Attorney General to Congress supporting this legislation, along with the bill we submitted. I request that this material be placed in the record at this time. We continue to support amendment of the Expediting Act for the reasons set forth in the Attorney General's letter.

We have also been requested to give our views concerning S. 1088, a bill cited as "The Antitrust Settlement Act of 1973." This bill would require that prior to entry of a proposed consent decree, the district court shall direct the Government to publicize the terms of the settlement by publishing for 7 days over a 2-week period in newspapers for general circulation in the district in which the case has been filed, in Washington, D.C., and in such other districts such as the court may direct the following information:

- (a) a summary of the terms of the proposed consent judgment;
- (b) the description of the case, setting forth the alleged conditions which led the Department to conclude that the antitrust laws had been violated;

¹⁰ 15 U.S.C. 28, 49 U.S.C. 44.

(c) a listing of materials available to the public—and the places where such materials are available for public inspection; and

(d) an invitation to members of the public to send their comments on the judgment to the Attorney General.

The court is also instructed to take such other steps as it deems appropriate to insure that the public has adequate knowledge of the proposed consent decree and an opportunity to comment.

The time period prior to entry of the decree would be extended to 60 days, or longer if the court deems necessary. Within that period the Department would be required to distribute to the court and to the defendant copies of any of the comments received from the public and to submit a statement that the Attorney General or his designate has taken into consideration these public comments that he believes the proposed judgment to be consistent with the antitrust laws and in the best interest of the United States, together with a full and complete articulation of the reasons for his belief.

S. 1088 also provides that if substantial changes “of public interest” are made in the proposed consent judgment in the 60-day interim, the judgment shall be treated essentially as one which has been presented to the court for the first time, subject to the bill’s provisions for original notice to the public, and the like.

The bill would require that a hearing be held before the court on whether the judgment should be allowed to become final, unless the court finds there is no substantial controversy. The bill contemplates a hearing could be held before a special master appointed for that purpose. The bill would also provide that costs for any publicity be shared equally by the United States and the defendant, and would permit the court to award costs incurred by any person in preparing and presenting comments or responses thereto. Apparently, these costs could be awarded to third parties, and the bill does not designate the party or parties who should be taxed with such costs.

Finally, S. 1088 provides that nothing contained therein shall limit in any way the existing power of the courts to make orders, nor shall anything in the bill limit or expand the power of the courts to accept or reject proposed consent judgments nor shall anything in the bill limit or expand the rights of any person to intervene in any suit or proceeding arising under the antitrust laws.

S. 1088 would, in large part, simply codify existing Department practices concerning consent decrees. As I have indicated in my earlier testimony concerning S. 782, we have attempted and I believe we have obtained a rather widespread publicity of each of our consent decrees. We have also explained to the court and to the public the reasons why we believe these consent decrees are in the public interest. In addition, we have notified the court of any changes made in our consent decrees during the 30-day waiting period, and third parties have, in the past, informed the court of their objections to the consent decree—to which we have responded before the court. The court now has power to impose reasonable costs for publicity and other expenditures.

While I see no reason for enactment of S. 1088, its enactment would pose no undue burden on the Department, as it represents principally a codification of present Department policies. Substantive changes can be found only in the mandatory publication requirement, and

the extension of the waiting period on final entry of the decree from 30 to 60 days—to which we have no objection. Additional funding should be allowed for systematic publication and costs, which can be expected to impose a heavier burden on our resources.

Mr. Chairman, I would like to add just one thing to my prepared statement.

We received S. 1088 for comments rather late. On examining those provisions once again, I would like to express one concern concerning those provisions which is not reflected in our written statement.

That concern rests in the interrelationship between the filing of the statement by the Attorney General and what appears to be a requirement of the hearing unless there is substantial controversy.

I am not altogether sure precisely what that is going to mean to us. I would have a fear that, even in cases where there has been widespread publicity, and no comments have been received, the court might feel compelled to hold a hearing, which seems to me would be unnecessary.

So that my concern would be over what appears to me to be the rather mandatory language concerning the hearing.

I think that concludes my statement.

Senator TUNNEY. Thank you very much, Mr. Kauper.

Of course, at any time in 30 days from the time that the hearing is closed—and this is legislation—the Department can file a written statement, supplemental to your testimony with the committee, laying out your views on any of the matters that come up during these hearings, including bills. I hope you take advantage of it.

Mr. KAUPER. Well, I simply wanted to raise this to make my statement as complete as we could at this point.

Senator TUNNEY. Thank you very much, Mr. Kauper. I appreciate your thoughtful and helpful testimony. I know that you have given a great deal of thought to this legislation. It is self-evident from the statement that you made.

As I was listening to you testify, I could not help but be struck that you and the authors of the legislation, Senator Gurney and myself, have similar objectives. That is that we both want to insure that consent decrees and that the consent decree procedure continue to serve well the antitrust enforcement effort of this Nation.

We would both like to see the best possible procedures toward that end. Both of us want the antitrust consent decrees to be used by the Division, and we do not want to see the consent decree procedure be unnecessarily burdened or weakened.

Accordingly, I have a number of questions with respect to your testimony. While I believe that we share a number of common objectives and assumptions, I think that we view the legislation in different fashion.

First, I would like to mention that I am gratified that the Department has come out in support of sections 3 and 4 of S. 782, and I hope we can move expeditiously in this area.

Mr. KAUPER. So do I, Senator.

Senator TUNNEY. I recognize that you have, in 1969, made an effort to insure that we are able to expedite the appeals process, and I think this is essential. I think that the Government ought to have interlocutory appeals. It is critical to give that ability to the Department.

I think that we ought to explore some of the problems that are contained, at least insofar as you can view them as problems, in section 2.

Let me begin with the very outset of your testimony, for I think that we place a different emphasis on certain aspects of the legislation.

You indicated in the second paragraph of your written testimony that S. 782:

Could involve inquiry into a variety of matters and, in some instances, could require a full hearing prior to approval of consent decrees involving the subpoena of documents and witnesses and taking of sworn testimony concerning evidence of the violation alleged in a complaint, the relief to be obtained, the anticipated effects of that relief, the remedies available to private parties, the procedure and standards to be applied for modification of the judgment, and the events which might require such modification, alternatives to the proposed judgment, and the anticipated effects of the proposed judgment, and any special circumstances giving rise to the proposed judgment or any provision contained therein.

Now, most of these elaborate on a requirement which, in my opinion—by just a simple reading of the legislation—are not mandatory, but are optional with the court. They are optional if the court decides that it is in the public interest to require it.

I would think that the court would use those options rather sparingly, and only if the court decided that it was in the public interest to require them.

I do not believe that the court would, under normal circumstances, require a full hearing. As a matter of fact, I think in the great, great majority of cases, the court would not require such a full hearing.

Mr. KAUPER. Senator, I did not mean to suggest and I do not think the language of the statement meant to suggest that it would be mandatory in every case. It was put in terms of what it could do.

I think you are perhaps correct. Logically, a court looking at these provisions would, in most cases, not require a hearing at all.

Our concern is that reading this legislation as a whole, as a judge, that he may very well—and I think this is not an unlikely result—feel compelled to hold some kind of hearing whenever any kind of question has been raised.

Now, let me expand a little on that, if I might.

The vast majority of cases, I think—I have not borne this out statistically, but I think most people would agree—in which some kind of objection is raised tend to be the kind of case in which the basic objection is raised by private plaintiffs, who, for one reason or another—it may be the effect of section 5 of the Clayton Act, or for some other reason—do not want the decree entered.

That is not an uncommon phenomena. And I would fear that courts, reading this legislation, would take it as an invitation to hold that sort of a hearing.

I think my concern here—if I can put it in really rather simple terms—on the bill as a whole and section 2 is not with, for the most part, requirements of what we tell the court. I am inclined to agree that wide-spread publicity, a statement as to what the thing is all about in terms of anti-competitive effects and so on, is in the public interest.

So I am not particularly concerned about those provisions elaborating on what the court must be advised of by the Department with respect to the settlement.

My concern is with the hearing provisions and, to a substantial degree, is based upon an impression one gets from the bill in toto, which is, by conferring a rather wide range of powers on the court, by directing it to make certain findings, that the court will feel compelled to hold a hearing.

Now, you and I may disagree on how a court is going to react to that. Perhaps that is a substantial part of what we are talking about. But that is, essentially, my fear over section 2. It is in the hearing provisions, the extent of judicial review.

Senator TUNNEY. In your statement, you say the courts do not simply rubberstamp antitrust decrees. In entering decrees, the court is called upon to perform a judicial act.

I think that is well established. The courts have the power right now, if they want to exercise it. I think you say as much in your testimony, and I think that anybody that has read the law knows that that is the case.

Mr. KAUPER. Well, I think it is true that a court does have the authority, under certain circumstances, to say it will not accept the decree, or that it will only with certain modifications. That is quite clear.

Indeed, the court could, in some circumstances, I think, compel that a hearing be held. It may be a very informal hearing. It may be simply for more detailed explanations by the Department. Indeed, more often than not, we send the staff attorney out with the decree, and it is presented in open court.

But I think that, if we take the entire tenor of the bill, because it requires the court to make certain kinds of findings, which I think it is not required to make now—for example, effective alternatives to relief is not a finding that is now required. I am not satisfied in my own mind that the court will in any way feel that it is capable of making that judgment even in a very simple case, without some kind of fairly extensive hearing.

Now, in part, what we are discussing is how a judge is going to react to this language. And I can conceive that a judge might say, "This really is not much different from what we have been doing before, and we will proceed as we have in the past." That is possible.

But we have a number of judges who, I think, might very well use this as a basis for some kind of rather extensive hearings on alternatives to relief, anticipated effects of relief, and possibly even going into things the Government should have asked for originally and did not ask for.

That concerns me a great deal with respect to these provisions.

Senator GURNEY. Will the Senator yield on that point?

Senator TUNNEY. I yield to the Senator.

Senator GURNEY. If that concerns you—but you do agree that perhaps a fuller disclosure of information is in the public interest. Do you have any suggestions as to revising the bill to meet your objections here?

Mr. KAUPER. Well, if the question that is being asked is: What changes might we suggest or would we find acceptable, I think there are three kinds of basic proposals made in this area—proposals which can provide for greater public awareness of the facts surrounding the

decree and which would not, in any way, impede our enforcement program.

Congress could provide, by statute, that the Government publish in the form of a press release, or in some other form, and to be filed with the district court, a statement which contains a description of the defendant's activities alleged in the complaint, in some detail; a description of the anticompetitive effects of such activity based upon the allegations in the complaint; an explanation of the proposed consent decree, including the relief to be obtained; an explanation of the manner in which the relief is designed to eliminate the anticompetitive activities and effects described in the complaint; a notification, when applicable, that a separate cause of action for treble damages may be available to private parties or governmental entities; a notification that, within 60 days after filing of the proposed judgment, the public may inform the Attorney General of any comments concerning the proposed judgment; and a statement that the United States may withdraw its consent.

That kind of provision, I think, is a publicity type provision. I do not think it causes us any difficulty. And it may do a couple of things. It does, of course, inform the public. And I suppose there is another part to it which is: In preparing a statement, you are thinking about it when you are negotiating settlements; you have those things in the back of your mind.

Hopefully, they are there anyway, but it does provide that kind of additional spur.

I think it codifies, to some extent, what we are already doing. It would, to some degree, expand upon it in terms of the kind of information which is made available to the public.

It would expand the 30-day period to 60 days, to which we have no objection at all.

Nor do we have any objection to a requirement that all written comments submitted to the Department by the public during that 60-day period be published in the Federal Register, assuming that the writer consents. There may be some times when a particular informant wants to communicate with us, and does not want it made public. Responses by the Department to these comments would also be published.

We have already made some revisions in our public explanations of consent decrees, and the further changes I suggest are along the lines of providing a good deal more or at least some more public information.

I think it is probably preferable that we do that by amendment of our regulations, where we can change them again as may be necessary without coming to Congress.

But they are those kinds of things that we can live with.

I might add that we have no objection to a requirement that, at the time the press release on the consent decree is issued by the Department, the corporate defendant shall release to the public a statement containing a complete listing of each written and oral communication, relating to the proposed consent judgment, made by or on behalf of the defendant to any Member of Congress or to any officer of the executive branch, except the Attorney General or his delegates.

This listing, I think, should contain certain information, such as the relationship between the individual making the contact and the defendant.

We are prepared to accept a provision which requires the listing of contacts with persons other than the Justice Department.

Now, I exclude the Attorney General or his delegates from the reporting procedures because we recognize that there has been some discussion of excluding contact by counsel of record on the theory that counsel of record are the parties that negotiate the decree and, obviously, these negotiations are what one would expect.

I think, however, the preferable way to do that is to exclude contacts with the Justice Department.

Senator TUNNEY. All the Justice Department?

Mr. KAUPER. Yes. I think counsel of record might contact other people.

Senator TUNNEY. Now, let us assume that that modification was made. You would then support a filing with the court of contacts made with other officials?

Mr. KAUPER. We would be prepared to accept a submission which is made to the Department or to the public with respect to those contacts.

I am a little concerned that, if it is in the context of legislation which calls for a hearing, the court may feel compelled with that on the record to examine in some detail those activities in circumstances where it might not be necessary.

But a publicity requirement I find not objectionable from my point of view.

Senator TUNNEY. And you feel that the Attorney General should be included within the exception?

Mr. KAUPER. Yes. I think so. Senator. There is always discussion of this. But the simple fact of the matter is that responsibility for enforcement of antitrust laws is with the Attorney General.

Any notion that contact with him is out of bounds is unfounded.

Senator TUNNEY. Well, I am not sure I disagree with you, to be quite frank.

What about the officials of the corporation who accompany counsel when they meet with members of the Department of Justice? Do you feel that that also should be excluded?

We had testimony here yesterday from two attorneys in town in antitrust practice who were with the Department of Justice, Antitrust Division, and they felt that oftentimes you have officials of the corporation accompany counsel to meet with the attorneys of the Department; and that, in all fairness, that they ought to also be exempted from the reporting.

Mr. KAUPER. I believe that is correct, Senator. I believe that the contacts made by corporate officials or by their counsel within the Department ought not be covered by any kind of reporting requirement.

I would, frankly, not want to do anything which would diminish the ability of counsel to bring his client in. The client, after all, is frequently the repository of information, and it can be very useful for us to have him there.

I think for that reason they, too, ought to be excluded. I think they would be, if what is excluded from coverage of the bill is contacts with the people within the Department of Justice.

Senator TUNNEY. So your recommendation is that the exclusion apply to Department of Justice officials and only to Department of Justice officials?

Mr. KAUPER. That's right.

Senator TUNNEY. Well, I am not at all sure I disagree with you. I think you make some good points there. I recognize full well that the chief of the Antitrust Division is, you know, working for the Attorney General, and it doesn't seem to me to be inconsistent with the purposes of this bill to exclude the Attorney General as well as the officials of the Antitrust Division.

We will have to consult with Senator Gurney on this point, and those who are interested in the legislation, if we mark it up as to what our procedure will be there, but I think you have got a very interesting point.

What does the present press release show? What facts did you outline?

Mr. KAUPER. The present press release is designed to give a statement of the nature of the alleged violation. That is, in rather simple terms, what it is that the defendant did wrong.

Second of all, a description of the terms of the decree, along with statements that describe the procedure, inviting response by the private parties or anybody else who wants to submit comments to the Department or to this court.

I think we have tried to expand somewhat already on the extent of the description, for example, of the nature of the violation. Now, that can get very complicated after a while.

We also make available to the public at that time—and, indeed, they may be available sooner—copies of our complaints which contain a much more detailed recitation of the nature of the violation.

I think probably we can expand those press releases in terms of the description of the violation, the danger being sometimes that you overdescribe it and it gets so complicated that most people reading it couldn't understand it.

That is a risk in some of these cases.

Senator GURNEY. Excuse me, Mr. Chairman. I wonder if the Assistant Attorney General could supply us with a half dozen representative press releases for inclusion in the record.

Mr. KAUPER. Sure. We would be happy to, Senator. We will get them up shortly.

Senator TUNNEY. Fine.

To whom is a press release given?

Mr. KAUPER. The press release is given to the press, basically.

Senator TUNNEY. I mean, what is the mechanical procedure? Is it just like any other press release? You just lay it on the table in the Department of Justice and just allow the press to come and pick it up?

Mr. KAUPER. They can pick it up or, in many cases, they will be notified in advance that a decree is being filed in a certain case. That's a fairly common practice; it depends upon the nature of the case, obviously. The release is issued at the same time the decree is filed with the court.

There are occasions, Senator, when we may issue a press release which actually is in advance of the filing of the settlement. There have

been one or two occasions I know of where we have issued a press release saying, "We have reached an agreement in principle, along the following lines." The primary reason for that is that in some cases, the fact of an antitrust settlement, the fact an agreement in principle has been reached even though details may not have been, if made available to defendants and their counsel may put us in a situation that would permit insider trading if the fact of that agreement in principle were not released to the public.

So there are times when one may see a somewhat different kind of press release, the press release which says, "An agreement in principle has been reached; specific terms have not yet been fully agreed upon."

Senator TUNNEY. Is there any publication in the Federal Register at the present time of the press release?

Mr. KAUPER. I think the answer to that is "No," Senator.

Senator TUNNEY. In the bill, we list in the public impact statement certain recitations, components of a recitation, which have to be published in the Federal Register, the nature and purpose of the procedure, a description of the practices or events giving rise to the alleged violation of the antitrust laws, et cetera.

I am not clear in my mind where the differences are between what we would require in the recitation that is published in the Federal Register and the press release that you presently put out, give to the press.

Mr. KAUPER. Well, let me preface that by saying, going back to my testimony, most of our objections focus upon sections 2 (d) and (e).

As to 2(b), which is I think the provision which you are talking about, the primary difference would be with respect to subparagraph 3 where we have a description of, "including explanation of any unusual circumstances," and I address that in my statement, and in paragraph 6, which is a description and evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives.

That, it seems to me, requires the filing of something like some kind of economic brief. I am not quite sure exactly the detail which the provision has in mind, but when one begins talking about a description of alternatives, I don't know whether that means alternatives that have occurred to us or precisely what it means.

I think the issue before the judge is whether or not the relief which is in the consent decree is adequate with respect to the complaint. I don't think the issue before him is whether there is other relief which is more adequate, and therefore I would not include sub 6 in that statement.

Senator TUNNEY. But 6 is the only one that you would—

Mr. KAUPER. Well, 6 and the provision that I referred to previously.

Senator TUNNEY. Yes, excuse me.

Mr. KAUPER. I think the rest we are not in substantial disagreement over.

Senator TUNNEY. But isn't it true that when one of your deputies writes a memorandum to you making a recommendation as to the form of a consent decree, does he not contain in that memorandum all the factors that are contained in section 2(b), which we would require to be published in the Federal Register?

Mr. KAUPER. I think it would not necessarily include what is in sub 6, Senator. Obviously, there are cases where he would; there are cases where he may not.

If, for example, we file a merger case, and the defendant agrees to divest the plant which is involved, I seriously doubt that anybody is going to consider any other alternatives.

If what we are obtaining is what appears to be the relief we sought in the complaint, there is not likely to be discussion of alternatives.

I think what you are really talking about at that point, Senator, is how was the petition for relief formulated in the complaint, because it may be at that point, in many of these cases, that alternatives are discussed, and I would have very considerable objection to going into the factors which go into what relief we are going to seek in the first instance.

That is not part of the consent decree problem; that is another problem.

Senator TUNNEY. I understand that, but when your deputy gives you a memorandum which describes alternatives to relief which are to a lesser degree than what had originally been asked for in the complaint, to—

Mr. KAUPER. Well, I think in that circumstance, Senator, he may discuss—and I don't know that we ought to put my deputy, necessarily, in this posture; maybe other staff people—they may discuss alternative ways of going at relief in a particular case.

Sure, there are cases in which alternatives are considered at that time. It is certainly not true in every case.

Senator TUNNEY. What would be wrong with letting the judge know that and the public, too, where you have several options that are available to you, and inasmuch as the judge is not rubber-stamping the decree, what would be wrong with letting the judge know what lesser degrees of relief were evaluated?

Mr. KAUPER. Well, I think, Senator, what we are talking about, really, is perhaps some disagreement over what the role of the judge is.

I do not conceive it as the judge's role to determine whether there are other more effective alternatives. I don't think that is traditionally viewed as his role.

The question is whether the relief which is proposed is adequate, not whether there is some other alternative within a range which might be more adequate.

He has a decree which has been negotiated between the parties before him, and that is the issue, and I am not sure that what is set forth in section 6 is relevant to what it seems to me the function of the court is.

Senator TUNNEY. Far be it from me to suggest that someone of your intellectual competence would be guilty of non sequitur, but I do think when in your statement you say very specifically that the judge is not involved in rubber stamping any consent decree, you are suggesting that he had a judicial role to perform in evaluating the efficacy of the consent decree in achieving the original objectives of the Department in filing the complaint.

And then to say, on the alternative, that the judge really shouldn't be involved in evaluating of alternatives, if they are of a lesser degree

of relief than was originally contained in the complaint's allegations, is in my mind inconsistent.

Mr. KAUPER. Well, Senator, there are times I am guilty of non-sequiturs; I don't think I am in this case.

Let me come back to it. It is clear that a court has the authority to examine the efficacy of the relief contained in the proposed consent judgment. I don't deny that; I have indicated that before.

He has a proposed judgment before him. That judgment has been negotiated between the parties, and the issue before him is whether the relief which appears in that decree is sufficient with respect to that conduct alleged in the complaint.

Now, it doesn't seem to me the issue before him is whether there is another form of relief which might be better. The question before him is: Is the proposed relief sufficient?

Now, that to me is not a comparative judgment.

Senator TUNNEY. Well, how can he make the determination whether or not it is efficacious in achieving the goals of the complaint, unless he has some idea of alternatives, unless he conducts his own private investigation which obviously he cannot do?

I mean, there are varying degrees of effectiveness, aren't there? You either have major or minor relief, and shouldn't an unbiased judge know those alternatives?

Mr. KAUPER. It seems to me that when one is asked, "Is this going to be sufficient to take care of the difficulty alleged in the complaint?", that one does not need to know, "Are there other ways of doing the same thing?"

The other ways of doing the same thing are not what has been negotiated between the parties, and it seems to me that is simply not in issue before him.

Now, your description of this, "Is he not going to have to know what the alternatives are before he can proceed here?", I must say. Senator, raises again the problem I have with parts of this bill on which you and I had some disagreement earlier, which is that if he is going to really do that, if that is really what we are talking about, then I do have again the concern I expressed over the hearing provisions, because I think you, yourself, have just indicated that if that is what he is going to be doing, he is going to have to consider those alternatives, as you perceive what this inquiry ought to be, and I think that is going to call for hearings. And then I am back in my original difficulty.

But I think in terms of the information that the Department ought to provide—and that is what we are talking about in (b)—the question ought to be a description of why we think this relief is adequate.

Now, it may well be that others will come in and in their objections will say, "Well, no, it isn't. Why didn't you do this or do that?"

But I am concerned that if we start describing alternatives, things that either we have considered—and I am reluctant to see disclosure of what we have discussed inhouse in public—or it means, alternatively, what other people may have considered. Now, we don't know that in all cases; we may in some.

And so it is really a twofold problem: one, I do not believe in terms of the standards presently applicable that the judge should be mak-

ing an inquiry into comparative relief; two, I think, if he is going to do that, then we are going to have the kind of hearing which causes me a good deal of concern.

SENATOR TUNNEY. Well, first off, we certainly are not intending that the statement of alternatives would be alternatives that were considered before the complaint was filed. We have to have an understanding on that point, because in your response to an earlier question, I think you alluded to the possibility of having to make that file available to the judge, and there is no intention of that.

We are assuming that the complaint has been filed and then the alternatives that were considered to meet the goals of the complaint, and I must say, that is, the judge is not a rubber stamp and we feel that there is a judicial role in a consent decree, and if the Assistant Attorney General in charge of the Antitrust Division has a memorandum which is made available to him, which considers those alternatives, and if there is a press release which shows how, in the opinion of the Department of Justice, the consent decree achieves the objectives of the complaint, and it is burdensome to the Department to make that available to the judge, in the first instance, because I don't think it is burdensome—it just requires a little bit of rewriting it and putting it in memorandum form, maybe using a few different types of legal systems—and second, I don't see how we can say that justice is obstructed by giving to the court information which I would think that he would have in being able to pass on a consent decree, but I suppose there is a difference in—wouldn't you agree it is not burdensome to begin with?

MR. KAUPER. I was about to comment. I did not want to leave you with the impression we were objecting to this really on the grounds of burdensomeness.

There could conceivably be cases, if what we are being asked to do is put together something we really don't have, that could impose burdens, obviously. But I think really we are talking about a disagreement over what the function of the court is, more than we are over burden.

SENATOR TUNNEY. Well, I detect that maybe you are somewhat distrustful of the judiciary in the sense that you may feel that the judiciary is going to subject the Department to all forms of burdensome hearing requirements and that you have a sense that judges—some judges may not be prepared to use good sense or common sense in adjudicating a matter and deciding what procedures to follow in adjudicating the matter. Is that unfair?

MR. KAUPER. I never like to be put in that posture, Senator.

No. I don't think that if the question is put in terms of are we distrustful of them, or something of this sort, no, I am not suggesting that, nothing of the kind.

But I am concerned that a judge reading this legislation may feel compelled to run a rather broad-ranging inquiry.

SENATOR TUNNEY. We don't want the judge to run a broad-ranging inquiry. That is not the purpose.

But we do think, if a judge has a role to play in making an evaluation as to whether or not the consent decree achieves the goal of the complaint, that he ought to have something more available to him

than he presently has, and he ought to have some of the alternatives that were considered by the Department.

And I don't want to belabor the point because there is—we do have other Senators that I know want to ask questions and we have limited time, but I think perhaps we just disagree as to what the role of the judge would be in this case.

Senator GURNEY. Would the Senator yield?

Senator TUNNEY. Certainly.

Senator GURNEY. Senator Ervin and I have a bill before this committee affecting criminal trials, which would require trials to be held and concluded within 60 days. This is, of course, because of the great delay in criminal justice, which is appalling.

What is wrong with putting in this section here, if it troubles you, about delay of an antitrust—perhaps a couple of things, one saying the judge isn't required to hold a hearing but, if he does and if he finds it advisable, then the hearings would be concluded within a certain period of time.

Wouldn't that be a very simple solution?

Mr. KAUPER. Well, I think, Senator, insofar as whether a judge is required to hold a hearing, I am not quite sure what that would do. I don't think I have suggested that the literal language of the statute must be interpreted that way anyway.

I don't know what kind of time period you would be talking about. Let me now put myself on the other side of the fence, if I might. There may very well be cases, under authority which exists now, where a judge would want to hold a hearing, where there are significant issues, and I think to put in an automatic period of time, while it might be helpful in terms of our burden, might in some cases really work a hardship on the people who do have legitimate complaints.

I don't want to be in the posture of sounding as though the Anti-trust Division is always perfect, we never make mistakes, and that there never are issues.

I think there may be cases where there are issues and it is conceivable if you put in a very short time period that you would, in fact, be cutting off some legitimate inquiry, and that would be my concern there.

I think from the point of view of time and how extensive the hearing is, on that feature, obviously it would eliminate some of that objection. I think the only question is: Would it impede a judge in some cases where he might want to proceed?

Senator GURNEY. Would it what? I'm sorry.

Mr. KAUPER. Would it impede a judge unduly in cases where he might want to proceed, as he could conceivably do now?

I mean, I think an automatic time requirement, being essentially totally unadaptable to the particular case, poses some obvious questions about whether or not the time really is sufficient to present whatever is to be presented.

Senator GURNEY. Well, now, you can't say that this is unacceptable because it is going to delay unduly the entry, final entry, of a consent decree; that's the argument we make and that is simply toss the baby out of the bath water and say, "Well, of course, we couldn't put any specific time in because that would be totally unacceptable."

Believe me, that is the non sequitur I think Mr. Tunney was talking about a short time ago.

Mr. KAUFER. Well, Senator, let me—I don't think I am trying to have it both ways. I think what I have tried to suggest is that there are cases in which a judge, today, may want to hold a hearing to consider objections raised by third parties, for example.

That can go on today. I think it is true that if you impose a mandatory time requirement on the hearing, you do eliminate arguments based upon delay as such.

But if one accepts the proposition that there are cases—which I do not deny—in which a judge may want to pursue this matter further, then it seems to me you may be in the position where an automatic cutoff date would deprive some people of the opportunity to present something they want to present to the judge.

The problem that we have with the bill is that we perceive—and I think maybe Senator Tunney and I and perhaps you have some disagreement over this—we perceive it as increasing the number of hearings.

That is the feature, I think, which we were talking about when we talked about delay and burden. It is not simply the automatic amount of time which is expended if a judge decides to hold a hearing.

Senator GURNEY. Well, it seems to me there are time limitations in our practice of the law now, the time to answer a complaint, and I don't see any great new discovery here of putting in a time limit and in holding hearings.

After all, we are talking about when we have arrived at the point of a consent decree, are we not? In other words, we are wrapping up the whole thing, presumably. What is wrong with putting a time limit in the hearings and——

Mr. KAUFER. Well, Senator, I guess maybe I am in a kind of a funny posture here, because from the point of view of the Division, I don't suppose we have any particular objections to a time frame.

I guess what I was trying to do is to suggest you've got some other people, people who—and maybe I shouldn't be their spokesman—who may be antagonists to the entry of a specific decree, who may be adversely affected by that.

That's the only issue I was raising.

Senator GURNEY. I can't really reason why they would be against putting a reasonable time in.

Mr. KAUFER. Well, they may not—we don't know, of course, what kind of time period you are talking about, but——

Senator GURNEY. I don't know we are prepared to settle on that, if we can agree it would do no harm to put a time limit in; that's what I'm trying to arrive at.

Mr. KAUFER. I would be prepared, I suppose, in the abstract to say if you have a reasonable time period, that it doesn't cause us any particular difficulty.

But it does seem to me that when one starts on that, the question of what is reasonable is going to be an extremely difficult thing to deduce, Senator, and maybe that is all I am really saying.

Senator GURNEY. Well, if the law is as it is, lawyers will argue what is reasonable from now until hell freezes over; there is no question about that. That is one of the great problems of the law.

But, as a lawyer—and I think I can make this criticism—it is a good idea sometimes to get procrastinating lawyers and procrastinating judges tied in to a time factor, so you can get in and get on the job.

Mr. KAUPER. I don't basically disagree with you on it, Senator. It is simply a question of whether one can arrive at a time period that is fair to the parties involved. I think that is really what the issue is.

Senator GURNEY. Thank you.

Senator TUNNEY. Senator Hruska?

Senator HRUSKA. Mr. Kauper, we have had testimony and the facts seem to be that in the 1960's, well over 80 percent of the antitrust suits brought by the Government have been settled, rather than tried.

Mr. KAUPER. I think that figure is accurate. I have heard the same figure.

Senator HRUSKA. Is that good or bad?

Mr. KAUPER. Well, I think there probably is a range of dispute over that. I think, in general terms, it probably is good, because I think most consent settlements do give the Government what it has been asking for and do it in a manner which does not entail both the use of our resources and, it seems to me equally important, considerable expenditure of judicial resources.

And that is a feature of the consent settlements that I think ought not be ignored; you are saving a good deal of judicial time.

I suppose, in answer to your question, whether you think 80 percent ought to be settled or not depends on whether you think those are cases in which the Government has gotten what it has asked for.

If it has, I find it very difficult to perceive of any objection to that figure. Indeed, if we could settle a hundred percent and get everything we ask for, I would think that would be desirable.

And I think, in general, the Government does get what it requests.

Senator HRUSKA. As a matter of fact, it is conscious and deliberate congressional policy in antitrust cases to encourage settlement, rather than to go through trial, is it not? And wouldn't that be testified to by the first proviso on section 5 of the Clayton Act which says when there are consent decrees, that may not be used as prima facie evidence in any suit which follows—or which follows at the hands of other litigants? Isn't that one of the purposes of the proviso?

Mr. KAUPER. Yes. I think that is true. I suspect, Senator, that there is a congressional policy favoring settlement in almost any Federal judicial case, but it is clearly recognized, I agree with you, in section 5(a) of the Clayton Act.

That provision is designed to recognize the legitimacy of consent settlements and, to a degree, to encourage their use. I think there is no question about that, and I agree completely.

Senator HRUSKA. It seems that in your statement and your testimony, you have the fear that a bill of this kind, calling for as many things as it does call for, would have a chilling effect upon the number of cases that would be settled, because in effect many of the areas that would be covered in the trial of lawsuit must be gone through by way of hearings and by way of introducing testimony and one thing or another.

Mr. KAUPER. Well, I think they certainly could be, yes, and our concern is, in large part, over our ability to continue to get settlements.

That is, I think, what this discussion is all about and what our fear is.

Senator HRUSKA. If your resources were unlimited and if the court resources were unlimited, that is one thing. But they are not unlimited, are they? And there are many, many other cases that are awaiting attention that could receive attention earlier and more effectively if there is not thrown into the picture and into the proceedings many burdensome and many encumbering procedures.

Mr. KAUPER. That is certainly true, Senator.

Senator HRUSKA. We recall several years ago in St. Louis at the American Bar Association annual meeting the Chief Justice of the United States complained because Congress is constantly seeking to add to the load of the courts, the Federal courts, in the field of consumerism, in the fields of environment, and in the field of class actions, and in many of these areas, and thereby, not immobilizing the courts, but certainly penalizing them to a point that our court system is very badly impaired in its ability to deal with its load.

Now, there are some people who would want to analyze this bill from the standpoint of being an effort to invade the court's province and to load up on the courts even more, even more by way of procedures and burdens and encumbrances.

Would you have any comment on that?

Mr. KAUPER. Well, I think, Senator, that in response to one of your earlier questions, I did indicate that our concern here is not simply with our own resources, which are not unlimited, of course, but with the resources of the court.

I think that is quite true and in some ways that is a greater resource shortage, perhaps, than our own at the present time. So I would clearly agree that one of the concerns here is that you are going to require the expenditure of additional judicial time.

And I think there is another feature on the consent decree—you asked earlier whether this was good or bad, in essence—that certain numbers of cases were settled in that way.

I think one of the things which people sometimes don't recognize is that a consent decree tends to come quite rapidly, that is, it provides you with relief quite quickly.

The same relief, coming after litigation, may come 5 years later, and you have a 5-year interim in which you don't have any relief at all.

So I think that that is another factor which clearly we all have to be concerned about when we are talking about are we unduly encumbering the consent decree procedure.

It is not just a matter of whose resources are being expended where; it is also a question of time, effectiveness, how quickly you remedy a particular problem.

Senator HRUSKA. Of course, there is a saving clause in the bill which says that none of the information that is developed in connection with some of these proceedings, will be available as prima facie evidence against such defendant in any later action or proceeding.

So there is a saving clause. Except for that saving clause, however, that first provisio of the fifth section of the Clayton Act would apply, because as soon as you get into any evidence, loose evidence, that

exemption of the immunity from prima facie evidence eligibility ceases, doesn't it?

MR. KAUPER. Yes. I think one would have a rather difficult issue here with respect to section 5, were it not for that proviso. I take it the proviso is designed to say that, for the purposes of section 5, this remains a consent judgment.

Now, you might have some problems otherwise, because section 5 talks about "entered before testimony is taken." I think probably that is what the proviso is designed to deal with.

There is still, it seems to me, a question here concerning section 5, and that question is whether the language of the bill, directing the court to consider the rights of individual parties allegedly injured by the same violation, might lead the court to conclude that, because of section 5, the fact that there would be a consent judgment would in itself injure private parties, and to require that the Government go to trial for that reason alone.

That is an issue I alluded to in my testimony, but that is not the same issue, I think, that you and I are discussing at the moment.

Senator HRUSKA. Turning now to the Expediting Act, this Congress did consider an amendment of the Expediting Act just a very few short years ago, and the Senate passed a bill and the House passed a bill.

MR. KAUPER. That's correct, sir.

Senator HRUSKA. However, the Government didn't want a private litigant, the non-Government party to the lawsuit, to have the same power and the same privilege as the Attorney General's certification to have the Supreme Court take it directly.

What is the reason behind that? Frankly, the Judiciary Committee turned that down and they said, "Why is the Government any different than any other litigant? The Government is a litigant, and why give them a privilege that is not given to the other side?"

The Government seemed to want a privilege that they would not extend to other parties. Would you like to comment on that?

MR. KAUPER. I think, as I understand the provisions which are in the present bill, the case can go directly to the Supreme Court upon certification of the Attorney General, or upon certification by the district judge at the request of the other party.

I think those are perfectly reasonable provisions, Senator. There is a difference between them, concededly. In one, the district judge has to say, in essence, "I agree"; in the other, the certification by the Attorney General, he does not have to say that. That I think is the difference between the two.

It seems to me that, given the role of the Attorney General in developing a coherent antitrust policy, there are sound reasons for saying, in the interest of that policy, that he should be entitled to certify that case.

I do not find the difference, which is that the district judge must agree with the private party that it is a case of such importance, really that basic a distinction.

And I think that is the scope of the difference at the moment.

Senator HRUSKA. I fail to see the distinction. After all, if the Government is given a privilege of preventing a consideration of the case

by the circuit court, and very often the record is such and the nature of the case is such that there isn't any machinery in the Supreme Court to consider that record in detail and maybe get additional scrutiny of all the points involved, and so on, they haven't got time in the Supreme Court to do that, and the non-Government litigant is deprived of the chance to have it processed in that way.

And it seems to me the Government—to be sure, the Government has an interest in developing a national policy in antitrust matters, but so do the non-Government sectors of our Nation. They also are interested parties.

It is a confession of possible weakness; isn't it?

Mr. KAUPER. I don't think that, Senator. I think that there are circumstances where the Attorney General, in trying to establish uniform policy, is going to perceive things somewhat differently than the district court.

Now, I would suppose that your response to that is going to be, "Well, isn't that true of the private party as well?"—and there, I think, the nature of the interests of the two parties is significantly different.

Now, we may have a very basic disagreement on that issue, but I think it is indispensable that the Attorney General continue to have that right.

I do not think that the case is going to be certified by him to the Supreme Court if it is the kind of case where the parties are going to benefit through fuller development of the record or something of this sort in the court of appeals.

The reason we support amendment of the Expediting Act, after all, is the belief that the vast majority of these cases should not be in the Supreme Court.

If we continued to believe, Senator, that every case was of that magnitude and should be tried in the Supreme Court, we, I assume, would be here opposing any amendment of the Expediting Act, and we do not.

It is desirable to get many of these cases out of the Supreme Court. I think you and I are in complete agreement over that. And I do not think that the Attorney General is going to certify cases where there are the kinds of issues that everybody can see are going to benefit or the development of which are going to be benefited by routing through the court of appeals.

We think, in general, that is a desirable practice. That is going to be the presumption I think one starts with.

Senator HRUSKA. The Congress has established a Commission for the purpose of getting into a revision of the Federal court appellate system. This is one of the things that is on the agenda for that Commission.

In due time, I expect to discuss that with my colleagues here to see that, instead of approaching that particular section on a fragmentary basis, that would be reflected in an individual bill, that that Commission be allowed to get into it for the purpose of fitting it into the whole scheme of things, such as the appeal system, which would include the three-judge courts, for example—and I have yet to meet a judge in the Federal system that is for the perpetuation of the three-judge court. They don't like it, and there are good and substantial reasons why they are outdated, obsolete and undesirable, but that would be in the

same realm that this Expediting Act is, because it is over 60 years old now and long ago outlived its usefulness, if it ever had any to begin with.

But we can get into that at a later time.

Do I understand that the penalties in the bill in S. 782, are the criminal penalties?

Mr. KAUPER. Yes, Senator.

Senator HRUSKA. We, of course, have considered that in our attempt, in several of our bills. There was a Commission on that also, which rendered its report 2 years ago, to get a revision of title 18, the entire criminal code. Part of that very well considered report, and it is in the bill S. 1—implements that Commission report by way of an attempt to legislate.

There is a chapter in it on penalties, and I believe it will be found to cover this point, also, but we can also discuss that at a later time.

Incidentally, a Senior Senator from New York, a Senator from Wyoming, a Senator from Texas, and this Senator from Nebraska introduced, day before yesterday, a bill to establish an antitrust review and revision commission.

It is about our tenth effort to get something rolling on that. Nothing had been done since 1955, although we have had several Presidential commissions write very nice reports, but they are gathering dust at the present time in some unknown filing cabinet.

I wonder if we will ever get to the point where we will try to modernize the approach, the rationale, and rearrange many of the points that we now find in our retirement law.

Senator TUNNEY. I would suggest, Senator, that if you support this legislation, that would be a way of implementing some of the suggestions you have made.

Senator HRUSKA. I wish I could see that a fragmentary approach to as big a thing as this would have any great effect or impact. I would doubt it, I would doubt it.

And certainly, if we are going to make any headway in dealing with the difficulties our judicial system is in, we are not going to make much progress by fastening onto the court and the Government the necessity to file detailed impact statements.

How much of an increase in personnel would we need for the many cases? How many antitrust cases do you file a year?

Mr. KAUPER. Well, the last fiscal year, Senator, it was 89. 87, pardon me, I stand corrected.

Senator HRUSKA. 87 impact statements covering a multitude of things: remedies available to potential private plaintiffs damaged by the alleged violation. I thought that was usually the job of the lawyer for the plaintiff in such cases, but now they are going to get an impact statement written by the Government saying, "You have these remedies, and we suggest you do this and that and the other."

And a description of procedures available for modification of the proposal: I thought that was contained in the statutes now. I suppose you would have to, in your impact statement, point out the different statutory sections that allow for proposed modification, wouldn't you?

Mr. KAUPER. I would assume we would have to describe the procedures. That may be a little difficult. There is probably some disagreement over what they are.

Senator HRUSKA. Then, of course, we get into the evaluations and descriptions of alternatives. One of our witnesses the other day said that, as a practical and realistic matter, consent decrees are a very private arrangement in which the court is not afforded the opportunity or assigned the responsibility of fashioning relief; rather these tasks are effectively taken away from the court and placed into the hands of the Department of Justice.

Now, you have already engaged in a colloquy with members of the committee this morning on that subject. Let me ask you this specific question: Do the judges of courts to whom these consent decrees are handed, do they ever ask you questions about them?

Mr. KAUPER. Of course, Senator.

Senator HRUSKA. What kind of questions would they be?

Mr. KAUPER. Well, I think, Senator, in the typical case, at least commonly, when we enter a decree, we don't simply take the decree and hand it to the court clerk and say, "File this, and have the judge sign it."

We send a man out, one of the trial staff out with it, explain the decree to the judge, and it is not at all uncommon for him to ask—after all, he may have some rather complex language in front of him—what it means and why certain words were used and what one hopes to accomplish.

That is done now, for the most part, on a very informal basis, but, sure, questions are asked and questions are answered. It is not a matter, as I indicated in my statement, of a judge rubberstamping a decree.

Senator HRUSKA. I doubt that any judge on the bench and a lawyer if he were asked to sign a document brought to him cold, I doubt very much he would affix his signature to it without canvassing it a little bit, probably turning it over to his law clerk and asking him to read it, to summarize it, and consider whether or not it is what it pretends to be.

Senator HRUSKA. Don't you find that to be pretty much the practice?

Mr. KAUPER. I am sure it is, yes. I don't think judges just sign things people put in front of them. Senator, so, yes, I am sure they go over the decree: there's no question about that.

Senator HRUSKA. Thank you very much.

Senator TUNNEY. Senator Gurney, do you have any further questions?

Senator GURNEY. Mr. Kauper, in spite of some of our differences of opinion on this bill, I do want to compliment you on a very thorough and fine statement analysis of the bill. It will be very useful to the subcommittee.

I just have one or two questions, perhaps, to pursue a little further here.

If you would turn to page 15 of your statement, in the first full paragraph there, the last sentence says that, "Under S. 782, we could well be required by a court to go to full trial." Why do you think that is true?

Mr. KAUPER. In section 2(d) of the bill, more specifically in subsection 2 of 2(d), the court is required to consider:

The public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit to be derived from a determination of the issues at trial.

Now, it seems to me—and maybe this is not what was intended—but it seems to me that that sounds like either a direction or an invitation, depending on how one reads this, to the court to say that if a consent judgment is entered in this case, that fact alone will have an adverse impact on private parties, because under section 5(a) of the Clayton Act, they would be deprived of the prima facie effect of that in their own lawsuit.

And if the judge is then directed to “consider the public benefit to be derived from a determination of the issues at trial,” it seems to me he is free to say, for that reason—because it is a consent judgment alone—“I believe this case should go to trial to give these private parties the benefit of a final judgment.”

That’s what that statement in the testimony means. I am not altogether sure that that perhaps is what was intended in the bill—

Senator GURNEY. It wasn’t intended by this, and I think your observation is well made. That’s why I asked the question, because I don’t think we want that impression to be there.

Senator GURNEY. One other question on this time factor, because that does disturb me, as perhaps you might have gathered in a previous question.

Let me ask you a little bit about the trial of antitrust cases, and I am totally unfamiliar with this area. How long does it normally take you to conclude an antitrust case, after the complaint has been filed—an average length of time?

Mr. KAUPER. Senator, I don’t know that I have an average figure. We might be able to give you that sort of a figure over a period of time.

Senator GURNEY. Could you give us the long and short figure?

Mr. KAUPER. Well, I could give you the horrible, which would be the *El Paso* case, which I think ran 17 years. That is obviously, I think, you know, the prime example I can come up with on that end.

There are other cases, for example, bank merger cases tend to go rapidly. There is a reason for that, and that is that under the bank merger statute, there is an automatic stay on the merger. That stay makes it in the interest of everybody to try that case very rapidly, and those cases are tried much more rapidly than most other merger cases for example.

Senator GURNEY. You still don’t like that time provision I suggested?

Mr. KAUPER. I am, as I said before, somewhat concerned with an arbitrary cutoff on consent decree hearings.

In further answer to your earlier question on litigated cases, I would suppose that the average antitrust case—and it would vary a good deal, depending on the kind—but a civil case, anywhere from 3 to 4 years probably is the average duration to get the matter through trial, and to get to the point of a decree. The point of decree, after all, may take some time beyond the conclusion of the trial.

It’s an extensive period of time, Senator.

Senator GURNEY. Well, I thought it was. That’s why I asked the question, because if it does take that long, it doesn’t seem to me that 2 or 3 months more, or whatever time might be reasonable to conduct hearings, if the judge thought he had to do it, would really matter much. And that’s why I asked the question.

Now, if you were getting these cases disposed of in 2 or 3 months time, or even 6 months time, then I could see that the point would be well made, but it is a matter of a few years. As a matter of fact, I think one of the attorneys who testified before us here, in the subdivision of New York said it is usually 4 to 8 years. It takes a little longer up there, but I would think that if that is the only real objection to this portion of the bill, perhaps we could devise a way to get that thing out of the way without really damaging the case timewise.

Mr. KAUPER. Well, Senator, let me respond to that, if I might. I think what you have done is to draw a comparison, which takes a litigated case, and says this litigated case is going to take 4 or 5 years, and another 2 or 3 months doesn't make much difference. Those are not the cases we are talking about.

The cases we are talking about are those cases which would be settled by consent decree. Those consent decrees may come very rapidly. And what you are talking about is an additional period of time on those cases, not on the litigated cases.

Senator GURNEY. Well, how about those cases? Now, let's set aside the bank cases, because they are in a special category. How long does it take to get a consent decree normally, on the average, after a complaint has been filed?

Mr. KAUPER. Well, I would suppose most consent decrees that we enter come within a period of less than a year after the filing of the case. There is obviously some period of time in which the parties try to figure out what each other are claiming, and then negotiations may begin.

It is possible, of course, a consent decree may come much later. It may come after trial, even. It may come at precisely the moment the complaint is filed, or almost immediately thereafter.

Senator GURNEY. I wonder if you could do this for the record. Could you supply for the record, in consent decree cases, how long a time has elapsed between the filing of the complaint and the entry of the consent decree, setting aside the bank cases, for the last 5 years? That wouldn't really take too much of your time, would it?

Mr. KAUPER. I think we could supply that, Senator.

Senator GURNEY. I was curious about that.

Mr. KAUPER. We will take it for cases in which the complaint was filed within the last 5 years and terminated by consent decrees.

Senator GURNEY. I don't have any other questions. I yield to Senator Tunney.

Senator HRUSKA. Would you yield?

Senator GURNEY. Yes.

Senator HRUSKA. One of the cases was the Standard Oil of Detroit, wasn't it, and that was filed in, I believe, 1940. This committee had much to do with that. It is the good faith defense in price discrimination cases filed. The case finally got to the Supreme Court in 1957. They sent it back to the Federal Trade Commission. It worked its way back up the Supreme Court and it was 20 years before that case was disposed of.

Mr. KAUPER. Yes, right.

Senator HRUSKA. But that, of course, wasn't a consent decree, but if we had any measure that would tend to reduce the number of consent decrees, and would force litigation, that would be a terrifying prospect.

Mr. KAUPER. Well, yes.

Senator HRUSKA. I am not saying that we would have to sustain the burden of that statement, that this bill would have that effect. I think a good case could be made for it. That would be a terrifying situation.

Mr. KAUPER. If one makes those assumptions, then we are comparing maybe a year to obtain the decree against the possibility, particularly if the matter goes on appeal, of 7 or 8 years alternative. Those may realistically be the choices you are talking about.

Senator TUNNEY. All right. Just one final question, and by the way, would it be possible, Mr. Kauper, to submit questions in writing to you, and then have you reply in writing, because we are running into a time bind here?

Mr. KAUPER. I suppose so, Senator.

Senator TUNNEY. We could propound those questions to you?

Mr. KAUPER. Yes.

Senator TUNNEY. Fine. It will be on points that have come up—that have not come up today, but which the committee feels important to get your opinion on, and they will not be lengthy, detailed. They will be just a few.

Now, one last question: I would be curious to know how you react to an amendment that I offered last year, which was to increase the funding for the Antitrust Division by \$2 million. It is my understanding that you have got about \$12 million now and, you know, we have had questions as to whether or not provisions of this act would increase the burden on the Antitrust Division.

We know that you are overburdened now. Would you feel that these additional appropriations would be helpful to you?

Mr. KAUPER. Well, I think, Senator, if the question is would they be helpful to us, the answer probably is yes. I think, however, we are at a time in terms of budgeting where that is rather a tough judgment to make. One is not talking in the abstract about simply putting additional money one place as though there was an endless amount of it.

Really, it becomes a judgment question in terms of where in the administration you are going to put money.

Senator TUNNEY. Fine. Well, thank you very, very much. You have been most helpful.

Senator GURNEY. May I ask one question?

Senator TUNNEY. Yes.

Senator GURNEY. If we gave you those \$2 million, are you afraid it would be impounded, by any chance?

Mr. KAUPER. I think I better not answer that, Senator. [Laughter.]

Senator TUNNEY. No comment. I feel very, very strongly that you have been most helpful to the committee, and we deeply appreciate the effort that you have made, and I want to assure you that it is my opinion that a consent decree is in the public interest, and what we want is to establish procedures in this legislation that are hopefully tailored to provide public information and promote public participation, and to the extent possible, to give the public, protection in those areas where it is in the public interest.

I think to that extent you and I agree. It is just the details as to how we are able to achieve that.

I also want to thank you for having Mr. Keith Clearwaters with you, attending the hearing. Thank you very much.

Mr. KAUPER. Thank you, Senator.

Mr. CLEARWATERS. Thank you, Senator.

Senator TUNNEY. The next witness is the Honorable Lee Loevinger.

I would like to say the committee did not anticipate that the Department's witness was going to be on the witness stand as long as he was, and we are running into a difficult situation with regard to the commitments of the Senators on the committee. commitments that have been made by them with respect to other Senate business.

Unfortunately, I have an unexpected meeting, which I am going to have to attend in a few minutes. Senator Gurney has kindly consented to chair.

Now, I know that Senator Gurney has problems with his time, too. It is impossible to get through the full list of witnesses. Perhaps the witnesses could submit statements in writing, and we could, on the committee, propound questions to the witnesses in writing or, in the alternative, the witnesses perhaps could come back at a rescheduled meeting, we could have their testimony, and we would guarantee that they would be the first witnesses to testify, whatever is considered in the best interests of the witnesses and in the best interests of Senator Gurney's time schedule.

But in the meantime, we are delighted to have the judge with us.

Judge LOEVINGER. Thank you, Senator Tunney.

STATEMENT OF LEE LOEVINGER, ATTORNEY, WASHINGTON, D.C.

I do not have a prepared statement. I shall attempt to be as brief as possible, and I think I can state my views rather simply.

There are three main provisions in S. 782, of course, one relating to penalties, one relating to the so-called Expediting Act, and then the consent decree provision we have been discussing.

Let me very briefly comment on the first two. The penalty provision is known to all of you. An increase in antitrust penalties for willful violations, as Senator Hruska points out, these are simply on the criminal side, has been supported, I think, by every administration for a number of years.

I have testified in behalf of it, on behalf of the Kennedy administration. I think I can say now that the Kennedy administration has supported such an increase in fines.

I might note that the European community, for example, may impose antitrust fines up to 10 percent of the gross annual sales volume of a company. Plainly, \$50,000 is inadequate.

I think there is something to be learned from this, that warns of the difficulty and the danger of specifying too many details in statutes, which perhaps the committee might keep in mind with respect to other aspects.

So far as the Expediting Act amendments are concerned, this is really a reform of the appellate procedure and this has largely been supported by varying and different administrations, and the judges of the Supreme Court, themselves, have spoken in favor of the necessity of this reform.

Similarly, I have testified in favor of such reforms on behalf of the Kennedy administration, and I can say that I am sure it has been supported—that we have supported a reform of this kind.

The one provision I think might be questioned is the one that I believe was mentioned by Senator Hruska, and that is section 5(b)(2), which permits the Attorney General, himself, without leave of court, to file a certificate that will have the effect of depriving the appellate court, the court of appeals, of jurisdiction and of sending an appeal directly to the Supreme Court.

If this simply were a matter of the Attorney General filing a certificate in advance of trial, I think there might be an argument in its favor. It seems to me to be quite unfair to allow the Attorney General, who at this point is one of the litigants, or his deputy, his assistant, is one of the litigants who has tried the case all the way through a bitterly fought trial, to deprive an appellate court of jurisdiction by filing his certificate after the appeal has been filed, which is what the provision now is. Therefore, I suggest that simply by the elimination of 5(b)(2), these sections could be made much more evenhanded. The Attorney General or Assistant Attorney General could still file an application to the court just as any other party, and I think this would be quite appropriate.

Now, I take it that the controversial and the important aspect of the proposed bill is that relating to consent decree procedure.

Let me give you just a little background, which may not previously have been mentioned. Antitrust consent decrees became important for the first time during the tenure of Thurman Arnold in the period of about 1939 to 1942. There were cartoons published in the newspapers of Thurman Arnold reigning as the czar of American business, using the consent decree as his weapon, and this sort of thing.

Decrees then were negotiated privately between the Department of Justice and the defendant, sometimes even before the complaint was filed. The decree would first become public after it had been signed by the District Judge, and was filed in court as an order of the court.

There was considerable complaint about this in Congress during the 1950's—discussions similar to that which has accompanied these bills.

On January 24, 1956, a consent decree was entered in the A.T. & T. case, which was a case that had been filed in 1949, seeking the separation of A.T. & T. and Western Electric, its manufacturing arm.

The decree in this case did not provide for divestiture, and merely imposed some relatively slight restrictions on the activities of A.T. & T. In 1958, there was an extensive investigation of the consent decree procedure of the Department of Justice by the House Judiciary Committee under Chairman Celler, and on January 30, 1959, the Committee issued a very extensive report containing over 100 printed pages discussing the A.T. & T. case.

Two years later, in 1961, the Kennedy administration took office, and one of the first things that we considered, in antitrust, at least, was this consent decree problem.

We drafted an administrative order, and on June 29, 1961, this order was issued by the Attorney General requiring that all antitrust consent decrees should be filed and made public at least 30 days before

submission to the court, so that we took care of the secrecy problem, provided for publication, and provided a means by which third parties could make their views known.

Now, that is the order which was appended to Mr. Kauper's statement. It's part 50, sub-part 1, consent judgment policy, in the attachment to Mr. Kauper's statement. I personally drafted that, and Attorney General Kennedy promulgated it.

It has worked so far as I know, since that date, and has worked well. In 1963, in an article on antitrust policy, I described this new procedure. I have got a couple of paragraphs from that article that I think might be worthwhile, and with the consent of the committee, I would like to insert them into the record.

Senator TUNNEY. Without objection, so ordered.

[The document follows:]

A procedural change involving a matter of policy was the institution of a new consent decree procedure pursuant to an order of the Attorney General issued June 29, 1961. This order was responsive to many demands from Congress and other sources for safeguards to insure that consent decrees, which lack the effective supervision of the litigation process, shall, in fact, serve the public interest. The order provides that decrees agreed upon by the Government and defendants shall be filed with the clerk of court 30 days in advance of submission to the court for entry, to permit notice and comment by other interested parties. It is believed that by permitting comments from competitors or others who are not parties to a proposed decree but may be affected by it, the Department and the courts will be better informed as to all the facts, considerations and probable consequences of a proposed action. Pursuant to this procedure, the Division has adopted the practice of stipulating with defendants for the entry of a proposed decree 30 days after the filing of the stipulation with the clerk of court in the event that the Department shall not have withdrawn its consent during the 30-day period by formal notice to the parties and the court. The stipulation and proposed decree are then filed with the clerk of court, becoming a matter of public record and comment.

The new consent decree procedure resulted in some diminution of the number of consent decrees during the first several months after its adoption but has apparently now been accepted without any serious question. Numerous consent decrees have now been submitted and entered pursuant to this procedure. The Department of Justice has not withdrawn its consent to a proposed decree in any case, and proposed decrees have been challenged in only two cases. In each of these, minor changes were made in the proposed decree by agreement between the Department and the defendant, and the decree was then entered by the court. In both cases the changes merely made explicit what the Department and the defendant had previously thought to be implicit in the decree.

Judge LOEVINGER. Now, the question then arises, what are the significant changes in this policy that are proposed by the two pending bills?

Well, first and most obviously, both of them propose lengthening the waiting period from 30 to 60 days. I don't think this is a matter of great moment either way. I think that the program will work whether the period is 30 to 60 days. although I merely point out that lengthening the waiting period moves in the opposite direction from eliminating delay, which has been the purpose of the committee and of the Department in many respects.

With respect to S. 1088, this requires publicity in newspapers with the Government and the defendant each paying one-half of the cost. It requires the Attorney General to submit a statement commenting on any comments that have been filed.

It, in effect, requires the court to order a hearing if anyone objects to the proposed decree because the court can skip the hearing only if there is no matter in controversy.

Now, any party who is smart enough to come in and comment on a decree is going to be smart enough to raise an issue of controversy. Therefore, I rather disagree with Mr. Kauper with respect to the provisions of S. 1088. I don't think that it merely codifies present procedure. It seems to me that it has some defects in draftsmanship. For example, it fails to indicate the effect of such a hearing on the subsequent use of the decree as evidence. I think it would vastly increase the burden on the Department of Justice far greater than S. 782 would.

It prescribes no standard for the entry of an appearance by a party commenting or objecting, although it offers a financial inducement to parties to come in by saying that they may be allowed costs. It permits unlimited repetitions of the 60-day waiting period by requiring that the 60-day waiting period be repeated whenever the decree is revised. Consequently, it could involve an inordinate delay, as well as great burdens on the court. It would substantially impair and impede antitrust enforcement.

S. 782 seems to me to be rather more carefully drafted. The provisions are known to all of you, and I shall not review them. Mr. Kauper has done so in a very careful and I think a well-considered statement.

I don't think that the adoption of S. 782 would be a tremendous obstruction to the administration of the antitrust laws. I do have some questions as to whether, in its present form, it would be highly advantageous.

And this is the thing that occurs to me. The antitrust laws, like nearly all of our laws, apply not only to the great headline cases that Congress investigates, and that we read about in the newspapers, and that we see on the front pages. It applies to a multitude of ordinary matters.

The Antitrust Division, year after year, files from 50 to 90 cases, an average of one a week or a little better. The great majority of them are what you might call "run of the mill." Eighty percent of them, as you have noted, are settled by consent, 80 percent of the civil cases.

The Department, the Antitrust Division, is sophisticated, experienced, relatively well-funded, and really quite zealous in its enforcement of these cases, particularly the run of the mill cases.

Let me mention, without identifying specifically, a case that I have down there now. A client was sued for an acquisition allegedly in violation of section 7. The Department sought divestiture.

After the suit was filed, we entered by consent a hold separate order. A short time later, and long before we were ready to go to trial, for a variety of reasons my client decided that it was willing to divest. We advised the Department of Justice and started negotiating on the form of an order that would provide for divestiture.

Well, they insisted on an absolute veto on the purchaser, and we have been haggling about that. It has been going on for 4 or 5 months. In the meantime, we found a purchaser.

I have now submitted to the Department of Justice, a complete plan of divestiture including the identity of the purchaser, and an SEC

prospectus relating to him. We still haven't agreed on the form of the order. I think we are going to be prepared to divest before we agree on the form of an order.

It has no great national importance. It has importance only in a single case. But it is not the case that the Department is indifferent to the public's interest or is just letting antitrust defendants run wild. There is no need for a great elaborate procedure relating to consent decrees in cases of this sort.

It seems to me that it would make a great deal more sense to rely upon the fine administrative order that was promulgated by Attorney General Kennedy in 1961 to govern the "mill run" cases, and provide that if there is a case of substantial public importance such that the Attorney General can legitimately certify it for action under the expediting procedure, that in such an instance then these provisions shall govern any consent decree that may be entered in that case.

Senator TUNNEY. What you are suggesting is some kind of trigger mechanism that could be applied to take the run of the mill cases out of the consent decree section 2; is that correct?

Judge LOEVINGER. Precisely, yes, Senator. In that connection, I would want to make one other suggestion, however. The expediting provision says that the Attorney General can secure expedition by filing a certificate of public importance at any time up to the entry of final judgment in a case.

Now, it doesn't make any sense to me at all to file a certificate requiring expedition after you have tried a case. I see no excuse for having a provision of this kind. I think that the certificate should, in the normal case, where it is required, be filed simultaneously with the complaint.

I would be satisfied to say that the Department might, upon reflection, after looking at the answer, reevaluate the importance of the case. But I think that the expediting certificate should be required, in any event, no later than 30 days after the filing of an answer in the case. If you then have an expediting certificate, it makes some sense because that means that the entire procedures in that case will be expedited.

Furthermore, there are certain practical consequences, I think, you can't overlook. That is the period when your consent decree is going to be negotiated probably, if there is one, that is between the time of the answer and the time of the trial.

Furthermore, your procedures, as proposed in S. 782, require that you file a statement relating all of the contacts, other than by counsel of record, between any representatives of the company and any Government official.

I raise this question, because this does happen in many cases, take the A.T. & T. case, which I suppose is one of the kinds that raises sort of a problem. Suppose that there had been such a bill in effect in 1956. How in the world would anyone in 1956 been able to file such a statement relating back to 1949? Presumably they didn't know there was any possibility of a consent decree until some months before they began to negotiate it.

Consequently, you have got a provision that may, as a practical matter, be impossible to comply with unless you adopt the provision that you and I have been discussing relating to triggering.

If you have a triggering provision, if you require the expediting certificate to be filed within 30 days of the answer, from that point on the parties are on notice that they must keep track of any contact they have with any Government officials. And I predict that such legislation would work.

Senator TUNNEY. Thank you very much. I saw an article of yours, and you have alluded to it today. It was a 1963 Antitrust bulletin article, which discussed your important innovation in 1961 which required that consent decrees must be filed with the court 30 days in advance of submission to the court for entry of judgment.

You indicated in that article that:

The new consent decree procedure resulted in some diminution of the number of consent decrees during the first several months after its adoption, but has apparently now (that was in 1963) been accepted without any serious question.

In much the same way, I would expect that the argument that we hear as to the potential burdensome aspects of S. 782 is somewhat overstated, and that as the procedures become regularly followed, we will find that they are not burdensome. Wouldn't you agree as to that?

Judge LOEVINGER. There is this possibility, but I think you have to recognize the corollary, also, that they won't be burdensome because what is going to happen is, it's going to shake down to a routine. There is going to be one lawyer delegated to write impact statements in the antitrust division, and he is going to grind them out, and they are going to be a stereotype.

So to the degree that the burden is eliminated, so also will the benefits be limited.

Senator TUNNEY. Do you feel judges ought to have available to them alternatives that were considered by the Justice Department that would achieve the goals of the complaint?

Judge LOEVINGER. I don't see that it is going to be terribly burdensome to tell the Assistant Attorney General—and when you say "Attorney General", you really mean the Assistant Attorney General—that this should be included in the impact statement.

I can understand the reluctance to have private or staff memoranda that are exchanged among the staff beforehand examined; however, I think that any attorney who is prepared to try a case, or who signs the consent decree, can always make up a statement as to what the alternatives are.

I would think there is more question about the statement relating to the remedies of private litigants, Senator, for this reason: The Department of Justice or the court may think, for example, that there is a right of private action available to private litigants, or, on the other hand, they may think that there is not.

In either event, this issue is not going to be tried or thoroughly briefed, or discussed, but once you get a statement in your impact statement, whether it says there is a private right of action, or there is not, and then if you have subsequent litigation between the parties, whichever party is favored by that impact statement is going to drag it out and go to some other court and say, "Look, this is the finding of the court that entered the decree."

I suspect that the impact statement with respect to that point is going to get more weight than it deserves. It will have been a point that will not have been that thoroughly considered. It may be a point

on which the parties wish to litigate later. And I suspect that it would be better to leave it out.

I think that the private litigants who come later will be better off without an impact statement on the right of private litigants. They are entitled to try their case on the merits and/or to brief it and argue it.

Senator TUNNEY. I would like to tell you how much I appreciate your testimony. I particularly appreciate the thoughts that you suggest with respect to a triggering mechanism that would be applied to section 2, and I think this is something which we certainly will have to consider.

I think you have made a cogent case for a triggering mechanism to be used in the application of section 2.

I want to thank you very much.

Senator HRUSKA. Judge Loevinger, welcome to the committee, which is a much used forum by you in earlier days, and in earlier years, much more frequent than it is now, but we always like to see you.

Judge LOEVINGER. Thank you, Senator Hruska.

Incidentally, I note that it is sometimes said that there hasn't been any good antitrust legislation within recent years, and I think people fail to give you credit. There was in 1961 and 1962 the Antitrust Civil Investigation Act, which I believe that you and Senator Kefauver sponsored in the Senate, which I think has been an invaluable aid to antitrust enforcement.

People tend to forget what has been done.

Senator HRUSKA. Do you recall, Judge Loevinger, the bill that we considered in 1970 on the Expediting Act? Did you have occasion to get into it at all?

Judge LOEVINGER. Not specifically. I am familiar, generally, with the bills that have been proposed over the years.

Senator HRUSKA. It allowed direct appeals from the district court to the Supreme Court upon application of either party and a finding of the judge that it would be a case of national importance, and therefore, should be allowed directly in the Supreme Court.

Judge LOEVINGER. Yes, sir.

Senator HRUSKA. The Senate version of the bill struck the provision that there could be an automatic appeal directly to the Supreme Court upon the certificate of the Attorney General. That was the basis of the hangup on the bill. It didn't make any progress in the Congress.

Would you have any thoughts on that situation?

Judge LOEVINGER. Yes, sir. I think it is really quite unfair to allow one of the litigating parties, on his own initiative and without approval of the court, to bypass a court of appeals, particularly when, as in this proposal, the certificate can be filed after the appeal has been filed.

In other words, the effect of the provision of section 5(b)(2) in S. 782 is to permit the Assistant Attorney General, if he doesn't like the court of appeals to which an appeal has been taken, to eliminate the jurisdiction of the court of appeals, and go directly to the Supreme Court.

I don't think this is either fair or wise.

Senator HRUSKA. And, of course, it is valuable to get the processing by the circuit court in many cases. In fact, that is one of the reasons

for seeking to eliminate the direct appeal to the Supreme Court, isn't it?

Judge LOEVINGER. The Supreme Court, itself, not as a court, but I believe a majority of the Supreme Court judges have expressed this view, that the reviews would be better, not simply in the circuit court, but at the Supreme Court level, itself, if they first had the benefit of a prior review by a court of appeals.

Senator HRUSKA. What do you think of the argument that is made that if the Attorney General has any good ground for his certificates, very likely it will find a very sympathetic consideration by the district judge?

Judge LOEVINGER. I think that that is perfectly sound. I would imagine that it would be a most unusual case in which a district judge would refuse to issue a certificate when requested to do so by the Attorney General.

Senator HRUSKA. I would think there is a double safeguard there. Certainly, no Attorney General, most of the Attorneys General that I have known, Assistant Attorneys General in charge of the antitrust division would not make a request that would be whimsical or that would be arbitrary, capricious. They would have a real ground for making the application. That is one safeguard.

The other safeguard is that the judge also would recognize that, and proceed on that basis.

Judge LOEVINGER. I believe there is one argument to be made in favor of requiring the application to be made to the court rather than permitting it simply to be issued by the Department of Justice, and that is this: No matter how responsible the Attorney General is—and as I say, you are really talking about the Assistant Attorney General—and how responsible he and his associates are and I agree with you, I think they have been men of ability and very responsible and conscientious, nevertheless, there is always a tendency to want to push your own case. The men who occupy that position are properly litigators, who want to win, and want to push their own case.

If you can achieve a result simply by filing a certificate, you are going to be a little bit more ready to file the certificate than you would be if it were simply an application to the court. If you knew that the court was going to look at it, and the court was going to pass judgment on it, you would be a little bit more careful about the certificates that you file.

Senator HRUSKA. Now, in a procedure of the Department of Justice, does the Solicitor General come in on a decision of this kind?

Judge LOEVINGER. I would think not. The Solicitor—well, now, let me withdraw that.

Senator HRUSKA. It's an appeal, and his job is to have overall jurisdiction over appeals?

Judge LOEVINGER. Yes. It is purely a matter of internal procedure within the Department of Justice. And when I said "I would think not," I was thinking of the fact that the Solicitor is not consulted with respect to the issuance of complaints or the settlement by consent decree.

On the other hand, the Solicitor is involved whenever action is taken involving an appeal to the Supreme Court. I suppose that probably the

Solicitor would be consulted. But this would be a matter that would be determined by the Attorney General. At the present time I don't believe there is any procedure relating to it.

Senator HRUSKA. Of course, one of the provisions of the bill, also, was that it would apply to the Interstate Commerce Commission appeals, and as I understand it, as I recall it, it eliminated that provision for special appeal and, of course, the Interstate Commerce had control of its appeal—has control of its appeal under that section, and they didn't want to give it up to the Solicitor General. That was one of the arguments that was made in consideration of appeal.

Judge LOEVINGER. Right. I think that would be an argument in favor of the present provisions of S. 782 with some of the modifications I have suggested. This does not apply, I believe—and I must confess I haven't done careful research because I had limited time—but it seems to me to apply to antitrust cases, and I think if you could legislate for them without getting the ICC involved, it would be easier to get legislation.

Senator HRUSKA. In that impact statement to which you refer, you did comment on the phrase that called for the remedies available to potential private plaintiffs, and you expressed yourself on that. This subparagraph there, however, includes a description on page 3 of the bill, a description and evaluation of alternatives to the proposed judgment, and the anticipated effects on competition of such alternatives. That would be quite an undertaking, wouldn't it, Judge?

Judge LOEVINGER. Senator, if you give me 5 minutes, I can dictate the standard form that is going to go into all those impact statements.

Senator HRUSKA. Would it be very meaningful?

Judge LOEVINGER. No.

Senator HRUSKA. You would have another form to fill out.

Would it serve any purpose? That is what I mean by asking if it is meaningful.

Judge LOEVINGER. Well, it would make people think about it a little bit, but I am inclined to think it would become pretty routine, and it would become pretty much like the Interstate Commerce allegation. It's the Interstate Commerce allegation, no matter what the complaint relates to, nobody pays much attention to them anymore, but it isn't a great issue anymore.

You have got complaints relating to, let's say, a real estate board, selling houses in Lincoln, Nebr., and they say this involves Interstate Commerce.

Senator HRUSKA. Thank you very much. It's good to have you here.

Senator GURNEY. Thank you, Judge. I don't have any questions. We certainly appreciate your observations.

Judge LOEVINGER. Thank you very much, Senator.

Senator GURNEY. Mr. Kohn is the next witness.

STATEMENT OF HAROLD E. KOHN, ATTORNEY, PHILADELPHIA, PA.

Mr. KOHN. Thank you, Senator. Like the cherry blossoms, I come back each spring.

I want to tell you briefly about myself, and then, if I can, just highlight a few of the points in my memorandum. I don't propose to read it.

I have been engaged in the active practice of law for approximately 35 years. A considerable portion of my practice is in the antitrust field, both for plaintiffs and defendants. A very substantial portion of my practice is not.

I don't purport to be an expert in any degree with regard to any of these matters, but, as I say, I have been here before, I have had an active practice, and I think I can summarize very briefly my views.

Senator GURNEY. Would you like to submit your statement for the record?

Mr. KOHN. I think it has been, or if it hasn't, it will be. I think copies were furnished.

Senator GURNEY. It will be received at this point.

[The document follows:]

STATEMENT OF HAROLD E. KOHN

For a nation so justifiably proud of being considered an open society, it is surprising we have so long tolerated a closed door policy in the Department of Justice.

Consent judgments are the method by which the Department settles most of its cases. These judgments have profound effects upon the economy and our citizens. That such effects also may be pernicious has been well documented in hearings by the House Antitrust Subcommittee, and has long been obvious to most informed observers. The *ITT* judgment is, of course, still fresh in everyone's mind. The 1956 consent decree between the Department of Justice and A.T. & T. in which A.T. & T. was *not* required to divest itself of Western Electric has been condemned by commentators and judges alike.¹ Certainly, then, the time is ripe to open the consent judgment procedure to public scrutiny.

The disclosure provisions of both these bills make good sense. Public disclosure and public input are traditional and worthwhile concepts. Legislation requiring the court to consider the public interest in accord with mandatory procedures is a desirable first step toward protecting the public from the impact of undesirable consent judgements. The court still would retain the ultimate discretion to accept or reject the proposed consent judgment. Surely, the judiciary should welcome any information to assist it in more fully appreciating the effects of such judgements.

The Justice Department, of course, has traditionally argued that the kinds of procedures written into these bills would have an inhibiting effect on the consent judgment process and would overburden the Department's limited resources. This argument makes little sense. The bringing of any lawsuit is a burden on the Department's resources. If the Department, however, becomes overburdened, the answer is more adequate funding, not less attention to deserving cases. In any event, the alleged overburden must always be balanced against the public interest.

Under the proposed legislation, the Department of Justice would still be free to enter into any consent judgment it desired. Contemplated changes merely would take the cloak of secrecy off the process and open it to public scrutiny. Even the best intentioned and most competent attorneys employed by the Justice Department may occasionally overlook the full implications of their own acts or be inclined to make a settlement that is less than desirable from the public point of view in order to avoid being overburdened.

Against that background, the basic provisions of these bills are a necessary safeguard for the public.

Having said that, however, I *do* believe there are areas in which this proposed legislation could be improved. I would suggest the following:

First, any parties who would be directly affected by the terms of the judgment should be allowed to intervene in the cause of action. S. 782 allows permissive

¹ See, for example, the decision by District Judge D. J. Pence, in *ITT Corporation v. GT&E Corporation*, 1972 Trade Cases 74,094 at p. 92,524.

intervention, but I don't think this is enough. Once the court determines that a judgment will have a "not insubstantial" impact on any party or group, intervention by right should be available. Only in this way can the full plethora of legal tools and remedies be available to those affected by the judgment.

Second, the consent judgment procedure should provide for the adjustment of the entire matter involved, including adequate restitution for those injured by the practices. Intervention by right would, of course, be a step in this direction.

Third, the proposed legislation should apply only to consent judgments having a "not insignificant" impact on a particular market. In other words, consent judgments having de minimus effects should be excluded from the purview of the legislation.

Fourth, the proposed legislation should provide that persons affected by the consent judgment have standing after its entry to insure that its terms are complied with. Under the law as presently interpreted by the courts, the only persons who can complain of noncompliance are the Government or the defendants. Obviously, this is not enough. A consent judgment which is not complied with is little better than no consent judgment at all. The only way of assuring compliance is to allow persons injured by violations of the judgment to seek judicial enforcement of its terms.

Fifth, I cannot agree with section "f" of S. 782 which requires the defendants to file a copy of all its communications with the Department of Justice relative to the proposed consent judgment. I think it serves no particular purpose as far as the public interest is concerned. There is a point beyond which the government and judiciary should not intrude in regard to private communications between lawyers and those with whom they are dealing. At best, this is a sensitive area standing astride the razor's edge of privilege and privacy. Any intrusion in this area should be allowed only in the most unusual of circumstances.

Turning next to the section of S. 782 relating to fines in antitrust cases I would hope by now that no one seriously questions the need to raise them above their presently inadequate limits. Fines should be at a level where they can reasonably be expected to have a deterring effect on violators. This becomes particularly true in massive pricefixing conspiracies involving hundreds of millions of dollars where the price of a ticket may be well worth the violation.

I would suggest, therefore, that to be effective, a fine must be sufficient to offset the economic benefits a violator may receive as a result of its wrongful act. Therefore, rather than placing an upper limit on the amount of fine which can be imposed, the court should be allowed to impose a fine in whatever amount is required to force the violators to disgorge themselves of any overcharges attributable to their illegal activity. There is precedent for such an approach under the False Claim Act (31 USCA §231) under which a person making a false claim against the Government can not only be fined a specific sum, in addition, can be assessed double the amount of damages which the United States may have sustained by reason of the fraud.

Further, such a fine should be coupled with a provision requiring that it be used for the purpose of restitution to those injured by the illegal behavior. In this way, the fine would not only have a significant deterrent effect, it would provide also a vehicle for reimbursing injured parties.

In regard to the portion of S. 782 pertaining to the Expediting Act, I feel this is an issue upon which the Justice Department can speak with more authority than myself. As a general principle, however, it is important that major antitrust cases involving basic legal issues be expedited as quickly as possible. An early Supreme Court clarification or pronouncement on an important issue may expedite the settlement of other matters, forewarn a corporate counsel and have other beneficial effects. However, the emphasis should be on the issues involved in the case rather than whether the case itself is one of general public importance. I would recommend, therefore, that the bill be amended so that cases eligible for expediting be enlarged to include those in which there is an issue of general public importance.

Finally, and this is a relatively minor matter, it would be helpful if the title of the bills would more accurately describe their contents.

I make these recommendations based on my legal practice which has spanned approximately 30 years, a considerable part of which has been in representing plaintiffs in private antitrust matters. However, I also have had considerable practice in representing defendants in both civil and criminal matters. Based on this experience, it seems to me that plaintiffs' counsel certainly would welcome

the provisions of these bills, defendants' counsel would not find them unduly burdensome, and the public would be guaranteed the salutary effects which flow from compliance with our antitrust laws.

Mr. KOHN. I suppose my own predilections are more toward the plaintiff's point of view in the private antitrust suit. I think, of course, that phase of our legislation is of great importance in preserving the free enterprise system that we are familiar with.

Let me comment briefly about S. 782. I think that no reasonable person would contend today that the penalty provision is adequate. I think that it should be a matter of little debate in the Senate that the \$500,000 penalty ought to be imposed. However, I would caution lest there be any overemphasis on the great good that will thereby result.

I think that penalty, like so many penalties, is some indication of the underlying irrationality of perhaps our whole criminal justice system.

I would hope that there would be study of a penalty which would be more nearly commensurate with either the damage done or the need to reimburse those who have been injured. I think there ought to be some more rational and tangible correlation between the penalty imposed—and I don't think it should be a penalty—I think it should be some kind of corrective measure, some kind of compensation as distinguished from a penalty.

I simply note that here, and hope that the staff will give its attention to that in the years to come, because I think, as I said, basically a \$500,000 penalty or a \$5 million penalty is essentially irrational when you are dealing with matters which involve literally—and I mean this literally—billions of dollars in antitrust problems of one kind or another.

Second, at the other end, I think there should be—and I would respectfully suggest this—no further attention given to amendments to the Expediting Act by the U.S. Senate. I think the importance of an amendment has been greatly overexaggerated. I used to, when I came here to testify, indicate that it was a matter of very little consequence, and that my own views were rather ambivalent, and I thought it should be left largely to the Justice Department.

However, I think, in view of the way it continues to recur, the criticisms, the discussion just in the few minutes or the hour or two that I have been here, would lead me to say that the time of the U.S. Senate is much too important to occupy itself with this matter, which is really of very little concern, I think, basically even to the courts.

I think actually the U.S. Supreme Court has probably spent less time in the last 5 years considering these appeals than the U.S. Senate has spent discussing whether the phraseology ought to be one way or the other. There ought to be some 20-year limitation—on bringing this up again—nobody will be in the least harmed. That type of overburden on the court has been very much exaggerated.

I do want to comment a little more, but briefly, about consent decrees. I think certainly some improvement in the present procedure is necessary—not only because of the ITT situation, which may have triggered this—but for much more substantive reasons.

I would suggest, once again, it is always important, not to delude oneself as to what one can do, nor as to what one is doing. The courts

are an institution which have developed procedures of their own over a long period of time, which do or don't pay attention to particular provisions of law, or enforce them, or don't enforce them as conditions indicate.

I would say that there are two very essential provisions of S. 782 with regard to consent decrees, which ought to be enacted and ought to be enacted very promptly. The rest, if it is going to bog the Senate down into a long discussion, which will be abortive, are of considerably less importance.

I would say that the two that are really critical are, first, the provision which appears at the bottom of page 3 in section (d), that the court shall determine that the entry of the judgment is in the public interest.

And, second, the provision which appears at the bottom of page 4, stating that other people have the right to participate. I have sufficient confidence in the adversary system just as I do in the free enterprise system, that if third parties have the right to participate, if they don't appear by way of grace, so that the courts can put them out or let them in as it sees fit or the Justice Department can admit them or not admit them as it sees fit, and if the court is compelled to take into account the public interest, then out of that adversary system, out of that absolute right to intervene and out of the self-interests of the parties who will intervene, you will develop a much more adequate protection than you can get by any kind of prescribed procedures, which will set forth a list of conditions which must be satisfied.

I think Judge Loevinger is right. Perhaps over a period of time, the Justice Department will develop an absolutely formal type of compliance, which will not achieve what we really want to achieve.

Now, in that light I would say, for example, at the bottom of page 4, that the word "interested" describing persons, the second line from the bottom, line 24 of that page, the "interested" ought to be taken out because that, itself, will give rise to years of litigation as to what constitutes an interested party. Does that mean somebody who has a legal interest? Does it mean somebody who has this, that, or the other thing? I think we should have a provision that any person may interfere. I have sufficient confidence in the courts that they will not permit frivolous interference. People are not going to waste their time.

The courts can segregate the cranks from the people who have some serious interest. And I would say that what you want to achieve, Senator, you will achieve if everybody has a right to intervene in these proceedings and make his presentation. So that I would say that certainly is important.

Second, the provision immediately before it, section (2), I would say ought to be taken out. The courts now have ample authority under the Federal rules to appoint masters whenever masters are deemed appropriate. I would not suggest to the courts that in this particular case they ought to give particular emphasis to masters, or then you will get the delay, you will get matters decided by somebody other than the judge, and I think these are important enough to have the decisions of the judge, himself.

The judges don't get that many antitrust cases, actually. What is burdening the courts is not the antitrust cases; it's the criminal cases and routine diversity litigation which probably ought not to be there.

And I think a judge can be expected to spend his own time on anti-trust cases of some consequence.

So that I would say that those two things are quite important.

Now, a moment ago I said that we should not delude ourselves that we are doing something that we are not doing. Section (f), on page 5, either ought to be in the act without exceptions or it ought to be the act. I don't think we ought to kid ourselves that if we require all that's to be provided here and exclude counsel, or exclude the Justice Department, that you are going to be able to avoid what was disclosed in the *ITT* case.

In other words, either you have to reveal every contact by everybody—suppose, for example, that the former law partner of the Attorney General happens casually to mention, as they are playing golf, that a large contribution is going to be expected from a particular litigant without ever mentioning the case or whatever. That certainly is something that I think we would all want to know if we are going to want to know anything—

So that I say, either leave it in complete, without exception, so that we do know, or at least we can expect that we are going to be told everything, or else leave it out completely.

Now, my own feeling is that there is probably no more sophisticated area of the law than trying to settle litigation, particularly major litigation. I think that we all ought to be very careful that we don't impede the likelihood of settlement.

Perhaps what we ought to do—I was amused when you were talking to Mr. Kauper about the length of time—I think that perhaps—I say this semifacetiously, but I think there is something to it—that perhaps a consent decree should be unlawful unless it is entered into within the first 6 months after the case has started.

What's the use of litigating for 17 years and then having a consent decree entered? I think you should encourage people to settle litigation. I think if we could settle 100 percent of the suits, they certainly ought to be settled.

I don't think there will be any substantial impediment to consent decrees, in most cases, if outsiders have a right to come in and suggest what is in the public interest. I have tried it on an informal basis, myself. For example, I have suggested in consent decrees in price fixing cases that the court should consider as part of the decree and refuse to accept it, unless there is some provision with regard to restitution. If some bookkeeper in a bank embezzles \$8,000, she can be told that she has to make restitution, or she goes to jail.

Now, why should a consent decree in a multimillion-dollar matter be entered without some provision for restitution? What have you accomplished by way of relieving the court from burden if you are going to follow that consent decree by 8 years of private litigation in 19 different districts around the United States, and then spend a year consolidating the cases before the multidistrict panel, and go on for years and years and years before anybody accomplishes anything?

That is what I mean by not deluding ourselves that we are accomplishing things.

There are consent decrees of all kinds, just as there are antitrust decrees of all kinds. And a consent decree that dissolves a major corporation, or upsets a merger, has accomplished something.

What in the world does a consent decree accomplish which says in a price fixing case, for example, "Go and sin no more"? The law, itself, says that you are not supposed to combine to fix prices. What do you really add by way of putting it in a consent decree? You can count on the fingers of one hand, I think, the people who have been prosecuted for violating consent decrees. The major thrust in that area, for example, of enforcement of the antitrust laws, has been the private suit, and I would hope that private litigation could be facilitated even though, in a sense, I am undercutting a substantial portion of my practice by suggesting that the Government take it over and do it for us.

Now, those, in the main, are the suggestions that I would make; in short, that I would hope that the penalty could be increased, without being under any impression that that, in itself, is going to be a major factor in enforcement of the antitrust laws.

I think you should give outsiders the right to come in as, of right, in the consent decree proceedings. And I honestly think that you are simply burdening yourself with something of no particular moment in the Expediting Act, which will simply, if it's adopted in one form or another, let 17-year cases to drag on for 27 years.

Senator GURNEY. I appreciate very much your testimony. I am not going to ask any questions because I am under a time limit, myself, at the moment.

Does counsel have one or two to ask, and if you do, would you make them short because I am quite overdue now.

Mr. LEVINE. Very brief. Thank you, Senator, and I apologize to you, Mr. Kohn, and to Mr. Kramer, and to Mr. Rowley for the inconvenience, and in the time I will ask you three very brief questions.

Mr. Kohn, I was very interested in the fact that your testimony urges the committee—your written testimony urges the committee to expand the scope of some of the consent decree provisions of S. 782. You elaborate on that, in part, considerably more broadly than they currently stand.

I would like to question you about some of your testimony to that effect.

First, in your written testimony you testify on pages 3 and 4 as to the possible areas in which persons directly affected by the consent decree might have greater impact on the ultimate result.

You argued first that any parties who would be directly affected by the terms of the judgment should be allowed to intervene in the cause of action as a matter of right.

And, second, the persons affected by the consent judgment have standing after its entry to insure that its terms are complied with.

In light of the testimony that we have heard with regard to the effect that some of those provisions, which are already included in S. 782 might be burdensome, don't you think that we might really be opening the floodgates with the provisions that you suggest?

Mr. KOHN. I don't think so. I think what you do is lead to a lot of "niggling" litigation when you have over-explicit provisions. I think you can trust people not to waste their time in engaging in vain and useless litigation, and the people who do have some substantial interest, that they want to vindicate, will participate.

I think, just like any other litigation, after all, anybody with \$15 or \$30, whatever it is now, can start an antitrust suit. And you don't have

too many of them started. And I think you would have the same thing if you followed the suggestion.

In other words, let litigants come in, and under the adversary system protect their own interests before a judge who is competent with the other two parts of the triangle there to defend themselves, and to make appropriate comments.

I think the judges are going to impose a reasonably heavy burden on anybody who seeks to intervene. They are not going to take any Tom, Dick, and Harry. It is going to be somebody who they regard as having a claim which has some substance and not merely frivolous.

Mr. LEVINE. Good. Second, I was intrigued by your suggestion in your testimony for sort of a trigger in S. 782, applying it only in certain cases. Judge Loevinger suggested his own trigger concept, using some of the provisions in the Expediting Act as the triggering mechanism.

Could you just comment on the advisability of the trigger mechanism he suggested versus the one that you have suggested in your written testimony?

Mr. KOHN. Well, as I indicated in my oral testimony, which is more me than my written testimony, I think the whole thing is a vain and useless excursion. I don't think it makes much difference how you trigger it, one way or the other, I really don't.

I think this idea of fairness on one side or the other—you don't have to have absolute symmetry and mutuality in the law—I think the Attorney General is vested with a somewhat different responsibility than private litigants, and I would say that he should be given a greater range of discretion in these matters.

He has no private interest whereas the private litigant does. He is, in a sense, a semijudicial officer. So that I say if you are going to have such legislation, what you have got is as good as any, and you can quibble endlessly on the various details of it.

I don't think—it is literally, really, without in any way being construed as denigrating anything that anybody has done, I think that the consent decree provision is where the emphasis and attention ought to be placed.

I, personally, would rather not enter into any extended discussion on the Expediting Act, and triggering this and triggering that.

Mr. LEVINE. In the interest of time, I would like to hold off on the other questions, but ask if we might be able to submit several of them to you in writing for your convenience.

Mr. KOHN. Certainly, whatever you want, or if you would want me to come back at some other time, I would be glad to.

Mr. LEVINE. Thank you very much.

Senator GURNEY. Thank you very much.

Mr. KOHN. Thank you.

STATEMENT OF PROF. VICTOR H. KRAMER, DIRECTOR, INSTITUTE FOR PUBLIC INTEREST REPRESENTATION, GEORGETOWN UNIVERSITY LAW CENTER

Senator GURNEY. Mr. Kramer.

Mr. KRAMER. My name is Victor H. Kramer. I have no prepared statement. I'll be happy to try to answer any questions the counsel or the Senator may have.

Senator GURNEY. Does the counsel have questions?

Mr. BANGERT. Yes, Senator, just a few, if we may.

Mr. KRAMER, the portion of the bill requiring a description evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives seems to have raised some problems with many of the previous witnesses.

First, that it's either going to be burdensome. Or, second, that it will become meaningless. And I wonder if you have any comment on that portion.

Mr. KRAMER. Well, I don't think it will be burdensome after an initial bath. Nor do I think it will become meaningless. I think that that preparation of such a statement in the case of some consent decrees would be very much in the public interest. The real problem with the bill, in that regard, in my opinion, is that it applies willy-nilly, both to criminal settlements—that is to say, settlements in criminal cases—and to settlements in civil cases.

As to the criminal settlements, I am absolutely clear they should be excluded from the bill. I see no problem whatever, nor have I heard of any evidence indicating there is a problem with respect to criminal settlements. And I think it would be mischievous to permit members of the public to comment on penalties in criminal cases.

Now, on the civil side I haven't got the answer for the committee. Several have been suggested, by which the provisions would apply only to certain kinds of antitrust settlements. I will throw into the hopper, for the committee's consideration my own suggestion, but I do so with diffidence because I'm not satisfied with it. Certainly I see no necessity for the elaborate consideration of consent decrees in civil actions brought by the United States in which the complaint is confined to a local market, and in which the offenses alleged are per se offenses, such as price fixing or allocations of markets. So that at least those types of settlements could well be eliminated from the bill.

Mr. BANGERT. I believe you were here when Mr. Kauper testified and suggested that a press release could be used. And I wonder what you think of that approach, as opposed to the approach that the bill takes.

Mr. KRAMER. I think very little of it. I do not agree that the present press releases tell the public or the court anything that it couldn't get by a perusal of the complaint and consent decree. And I do not think that the press release format lends itself to the type of considered information that the district court and interested members of the public should have.

In saying this I am not attacking Mr. Kauper's good faith, but I'm attacking everything else about what he said on that point.

Mr. BANGERT. Would you think that an impact statement would be any more burdensome than having to write the press release?

Mr. KRAMER. I think it might be and I think it ought to be in major civil antitrust cases settled by the United States.

I've heard a lot of talk, this morning, about delay in antitrust settlements. For heaven's sake, I'd like to see more delay in some settlements. The *A.T. & T.* case should never have been settled. It should have been delayed forever. And while I'm on that point, since I had the honor of testifying on the other side of the Congress on this very case at some length, 16 years ago, I want to point out something about these

ex parte communications. The then Attorney General, a man by the way whom I know well and like, the then Attorney General had a meeting in a cabin on some mountaintop with the vice president and general counsel of A.T. & T., in which they discussed this case. That should never have happened. It wouldn't have happened with this provision in the law, in my opinion.

Mr. Corcoran came to see me, attempting to pressure me into a settlement of the *United Fruit* case. He then went to the State Department—he was not counsel of record for United Fruit. I'm not so sure that if those contacts at the State Department had had to be made public that Mr. Corcoran would have done that.

Mr. BANGERT. Well, I take it maybe you don't agree with counsel of records exception, then.

Mr. KRAMER. Mr. Corcoran wasn't counsel of record in the *United Fruit* case. I should have made that clear. And I don't recall whether the vice president of A.T. & T. was counsel of record either. I was attempting to give you illustrations of noncounsel of record contacts that ought not to happen and that I think this provision will stop. Now, when it comes to drawing the line at the antitrust division or with the Attorney General, I'm not so sure.

Mr. BANGERT. With regard to the part of the legislation which attempts to involve the court to a greater extent in reaching an independent determination its proposed decree is one in the public interest—Yesterday testimony was received ranging, really, from strong support for both sections 2(d) and 2(e) to strong opposition to these sections. I wonder, for the record, if we could get your views on the advisability of these sections.

Mr. KRAMER. If we can solve the problem of going through the ritual in relatively insignificant antitrust settlements—if we can get rid of those somehow from the bill, I think that the bill's provisions are very much in the public interest and should be favorably reported by the committee.

Mr. BANGERT. Well now, you've heard the suggestions made for triggering. Do you have any comments on those or do you have any ideas of your own on the triggering device?

Mr. KRAMER. The only comments I have are those I have already made.

I am opposed to the repeal of the Expediting Act in antitrust cases. And because of the time problem I would like to submit for the record, when you're through with me, one page which states my reasons. If I favored the repeal of the Expediting Act, I think that the proposal by Judge Loevinger, which would require certification that the case was one of national importance at the beginning of the litigation, would be a very good triggering device.

Senator GURNEY. Your statement, which you would like to submit, will be received.

Mr. KRAMER. Thank you, Senator.

Mr. BANGERT. Lastly, if you would give us your view with regard to the criminal penalty increase.

Mr. KRAMER. I definitely favor it, but I urge the committee not to think that increasing criminal penalties is an important accomplishment. The antitrust laws depend, for effective enforcement, outside of

the local price fixing conspiracy problem, not upon criminal cases but upon civil, equitable relief. So, although I agree with all the previous witnesses today, let us not think we are accomplishing a great deal by increasing the penalties.

Senator GURNEY. Your thought is it isn't really going to make a difference one way or the other, as far as people violating the antitrust laws.

Mr. KRAMER. Yes, the only defendant who's going to get the big penalty is the corporation so huge that even the new penalty is minor and it will not be very much of a deterrent.

Mr. BANGERT. Senator, I think the record might be bettered if Professor Kramer could give us a little bit of his background, with respect to the time and the positions he held in the Antitrust Division where he was a very respected member of the bar and a member of the division.

Mr. KRAMER. Thank you.

I served in the Antitrust Division, with the exception of 2 years in the U.S. Naval Reserve, from 1938 to 1957. I was Chief for the last 6 years of the general litigation section there. From that time on I went into private practice, where I remained until 2 years ago. Since that time I've been in what we call, I hope not arrogantly, public interest law. And I'm director of the Institute for Public Interest Representation of the Georgetown University Law Center. However, I wish to state that I appear here today on behalf of myself, as a citizen, and not on behalf of the institute.

Mr. BANGERT. I have no further questions.

Senator GURNEY. Professor we appreciate it, very much, your taking the time to come down and giving us the benefit of your background experience, which is very extensive in this field.

Let me apologize for the fact that you had to wait so long, but sometimes these hearings go that way.

Thank you, very much.

Mr. KRAMER. Thank you.

Senator GURNEY. Mr. Rowley.

Would you like to submit your statement for the record, Mr. Rowley, and could you summarize it for the committee?

STATEMENT OF WORTH ROWLEY, ATTORNEY

Mr. ROWLEY. I would prefer to save the committee's time by submitting it for the record and not summarizing it.

Senator GURNEY. It will be admitted in the record.

[The document follows. Testimony resumes on p. 141.]

STATEMENT OF WORTH ROWLEY, ROWLEY & SCOTT, ATTORNEYS AT LAW, WASHINGTON, D.C.

This distinguished subcommittee has asked me to submit comments with respect to S. 782 (the Antitrust Procedures and Penalties Act) and to S. 1088 (the Antitrust Settlement Act of 1973). As an attorney engaged in the practice of antitrust law, generally in behalf of clients who seek the protections of that law, I much appreciate the opportunity to discuss this important legislation. It proposes long-needed reforms in government antitrust enforcement by means of civil consent decrees. In addition, S. 782 provides for increased penalties in criminal antitrust prosecutions and substantially modifies the Expediting Act of 1903.

At the outset, let me confess to my own convictions with respect to the problems which fall within the jurisdiction of the subcommittee. Like most of you, I strongly favor stringent antitrust laws and firm and effective antitrust enforcement.

Antitrust offenses are crimes. The antitrust laws are criminal laws. Antitrust compliance is regarded as so important that, in addition to the usual criminal law sanctions of fine and imprisonment, the Sherman Act also provides the virtually unique sanctions of government enforcement by civil injunction and of private enforcement by treble damage suit. The legislation here under consideration importantly expands the available sanctions by increasing the conventional penalty—the fine—and by regulating the civil injunction penalty to make it a more effective enforcement instrument in the public interest.

Let me first discuss the proposal to increase corporate fines from their present level of \$50,000 to a proposal level of \$500,000, and to double the fines generally assessable against individual antitrust defendants to a proposed maximum of \$100,000. I favor both measures, but I feel that they may not go far enough.

Conventionally, criminal punishment has had three ends—first, to protect the public by limiting the criminal's capability to inflict harm; second, to deter violations by making a public example of the criminal; and third, to reform the criminal. All of these are applicable to the antitrust field. Indeed, in this field an additional end should be taken into account—restitution for the benefit of the criminal's victim.

Existing antitrust punishments do not begin to accomplish these ends so far as corporations are concerned. Antitrust crime is very rewarding and existing antitrust penalties are disproportionately modest. A \$50,000 fine as against a \$1 billion price fix is not even a gamble—it is a mere licensing fee and one that is payable only if the corporation gets caught. As such, it has little deterrent effect, less reforming effect, and still less effect in protecting the public by limiting the criminal's capability to inflict harm. Because antitrust offenses can represent the most serious and far-reaching swindles, the Court's power to punish corporations for willfully engaging in them should, in my view, be limited only by the nature and extent of the offense, rather than by some arbitrarily proposed limit. The first antitrust fine I remember reading about, years ago in high school civics class down on Cape Cod, was the million-dollar fine imposed upon the Standard Oil trust in an Ohio prosecution. That did not seem out of line at the time, and I was surprised when I got to law school and learned about the niggardly dispensation provided by the Sherman Act for such offenses.

I urge the subcommittee to remove limits on corporate fines that can be levied under the Sherman Act, and to require the courts to impose at least such fines as will deny the offenders the fruits of their crimes and, in addition, will effectively punish them. To the extent that the fines are restitutionary and represent a forfeiture of ill-gotten gains, they could well be held in trust by the Government, for the benefit of the victims of the antitrust crimes for which they are levied.

With respect to the punishment of individuals, a better case can perhaps be made for a statutory limit. Without attempting to make that case, I would like to propose a sanction against individual criminal violators of the antitrust laws which would be more significant than a fine and substantially more protective of the public interest. I urge enactment of a provision that any individual convicted of antitrust law violation could not be an officer, director, or managerial employee of a company engaged in interstate commerce for a period of five or ten years following his conviction. The Securities & Exchange Commission punishes fraudulent security merchants by expelling them from the trade; the Bar deals with its unreliable members by suspension or disbarment; corporate management could profit by these examples, and S. 782 could guarantee that profit by including an appropriate provision in its Section 3.¹

S. 782 also provides for an extensive modification of the Expediting Act of 1903. As that act presently stands, it does two important things: first, it enables the Attorney General to convene a three-judge court to hear and determine, on an expedited basis, a Government injunction suit to enforce the antitrust laws;

¹ In its present form, section 3 is technically deficient in that a large business enterprise not in corporate form, such as a Massachusetts trust, for example, could not be fined on the same basis as a corporation. To carry out the bill's intent, in providing the \$100,000 limit only to individuals, the language to be inserted by sec. 3 should read, "\$500,000, except, if an individual, \$100,000."

and second, it provides for expedited appellate review at the Supreme Court level of the Government's civil injunction suits to enforce the antitrust laws, eliminating intermediate appellate review.

The proposed modifications would abolish the three-judge court procedure, require expedited hearings in the District Court of antitrust cases certified by the Attorney General to be cases of a general public importance, eliminate the present exclusive jurisdiction of the Supreme Court over Government antitrust injunction appeals, and provide for interlocutory review in the Courts of Appeals, but with direct appellate review by the Supreme Court being permitted in certain circumstances.

I do not favor these changes in the Expediting Act. They do not tend to increase expedition; instead, they tend to foster delay. The Expediting Act has been on the books for over 70 years. Such expedition as antitrust cases have enjoyed is directly attributable to it. This is faint praise, indeed, considering the poor course record that such cases have enjoyed, but certainly it is a better course record than would have been achieved without the Expediting Act.

Like all antitrust lawyers, I know that the principal defenses relied on to defeat Government antitrust prosecutions have been those of protraction, delay, and burden. Wear out the prosecutor, dishearten the Government trial staff by making it expend great efforts on futile enterprises, postpone the day of reckoning by snarling and confusing matters with a proliferation of paper, red herring issues, and the exhaustive discovery of irrelevances—these are the techniques that age and weaken the Government's evidence and deny the public the benefits of a prompt decision. These techniques are still available, and ample opportunity already exists to exploit them fully. Interlocutory appeals and intermediate appellate review need not be added to the antitrust defense bar's arsenal of dilatory weapons for it to practice its art of Fabian warfare far more effectively than the public interest can afford.

Consider, for example, the history of the *El Paso* divestiture case. This is, and always has been, a simple Section 7 Clayton Act proceeding. It began in 1957. Under the aegis of the Expediting Act, after repeated visits to the Supreme Court, it finally seems to have been resolved last week by the Supreme Court's denial of further appellate review. The unlawful combination between *El Paso* and Pacific Northwest Pipeline that has persisted since 1957, to the public's serious detriment, shortly should be terminated. If, instead of direct Supreme Court review, this proceeding had gone forward without the benefit of the Expediting Act, its sordid history of protraction and delay would only be half accomplished today, fourteen years after the case was commenced. With the benefit of the Expediting Act, there is now some hope that the case will be completed within the next year.

The Expediting Act, as presently on the books, does not impose an inappropriate burden upon the Supreme Court. The Government cases that reach that Court should do so in any event. The crucial issues in those cases normally are questions of basic statutory interpretation—issues that intermediate appellate review does not clarify. Such issues should receive authoritative Supreme Court resolution at the earliest possible moment to forfend any claim that the requirements of the antitrust laws are uncertain, and to promote effective antitrust enforcement.

The Expediting Act, in its present form, gives the Justice Department the power, by filing a certificate, of convening a special three-judge court to expedite antitrust injunction suits of general public importance. Practically all Government prosecutions are of such importance. In recent times the Justice Department has not seen fit to file any such certificates. Nevertheless, the existing dispensation should be preserved so that if, as, and when the Antitrust Division becomes really serious about antitrust enforcement, it will have the tools to work with. And the performance of the Justice Department to date in *not* filing expediting certificates with respect to antitrust prosecutions can well be read as showing what the Department would do with respect to expediting Supreme Court appeals, were it required to file certificates to get direct Supreme Court review, as is proposed in S. 782.

The reform and regularization of Government consent decree procedure in antitrust cases is a matter of immediate importance. So long as Government antitrust enforcement policy concentrates upon use of the civil injunction and limits criminal prosecutions to a very few of the most extreme cases, the public interest in the consent decree process will be very great.

Under present law, substantive provisions of civil consent judgments in Government cases, as well as the settlement procedures followed in such cases, are almost exclusively within the discretion of the Department of Justice. Although civil antitrust settlements broadly and deeply affect public rights, there are no regularized and effective checks and balances to govern them. Departmental policy has actively discouraged formal intervention in its civil cases by persons significantly affected by Government antitrust settlements who wish to assist in shaping relief, and even informal participation in the settlement process by private parties is narrowly limited: they can submit suggestions to the Department and they can criticize such settlement proposals as the Department makes public, but they are not permitted directly to participate in the settlement process itself. As a result, settlement negotiations today represent an unequal contest between defense counsel and their clients on the one hand, and a disproportionately small and relatively inexperienced trial staff and its supervisors on the other hand. The defense interests are possessed of the broadest and most sensitive of industry insights and expertness, while the Government side almost always proceeds under the serious handicaps of insensitivity and relative commercial ignorance, for its industry knowledge is limited to those bits and pieces of intelligence which it has acquired in the course of investigating and preparing its case. Moreover, in addition to the detailed and exact industry knowledge possessed by the defense side and not enjoyed by the prosecution, the defense side is usually quite prestigious in political terms, with great powers of persuasion within the Executive branch. Seldom are antitrust staffs or even Assistant Attorney General so endowed.

Small wonder it is that this unequal settlement process produces such misbegotten horrors as the consent decree in the American Telephone/Western Electric case.¹ The subcommittee will recall in that case that the Department sought divestiture from the Bell System of the Western Electric manufacturing enterprise which supplied the Bell operating companies with their equipment, to the end that the operating companies would source their future needs from an independent competitive telephone equipment market, rather than internally from the Western Electric affiliate. That decree, which was worked out in the dark of the moon, as major matters involving great economic powers so frequently are, in no sense accomplished this end.² Instead, the consent decree confirmed to the telephone company a power to continue its existing anti-competitive practices. In this instance, the enforcement process was counter-productive, serving essentially to confirm and legitimate the anti-competitive situation at which the complaint was directed, and tending to make it effectively immune from future antitrust prosecution by the Government. It is interesting to compare this anomalous result with the results being achieved by International Telephone & Telegraph Corporation in attacking a parallel but much more limited situation involving General Telephone & Electronics Corporation, where the private plaintiff is seeking and may obtain divestiture relief against the defendant's equipment manufacturing company and compulsory competitive bidding for the defendant's supply requirements. (See, *International T. & T. Corp. v. General Tel. & Elec. Corp.*, 351 F. Supp. 1153 (D. Hawaii, 1972).)

The unfortunate result of the Government's present consent decree negotiating policy is that the defendants get to participate in the negotiations, while the victims, whose rights are primarily involved, are barred from any real participation in those negotiations. Only after some tentative arrangements are reached do the victims even know what proposals are under consideration. At this stage, the negotiations have arrived at tentative decisions to which the Government trial staff has provisionally committed itself. The role of the affected third party has been made correspondingly more difficult, for he has been placed at a serious disadvantage. Not only is he faced with an alliance between the Government trial staff and defense counsel brought about by their mutual interest in justifying the provisional decree they have agreed upon; he also must criticize the Government's tentative arrangements and submit his own supplemental proposals or counter-proposals ignorant of the facts, arguments, and circumstances (all fully known to the defense) which have caused the Government to work out the provisional arrangements in question. Thus, the victim is seriously handicapped in dealing with those facts, arguments, and circumstances.

¹ *U.S. v. Western Electric Co., Inc., et al.*, 1956 Trade Cases, ¶ 68,246 (D. N.J., 1956).

² See, 85th Congress, House Committee on the Judiciary: Consent decree program of Department of Justice, hearings before antitrust subcommittee: pt. I, Oct. 21-24, 1957; pt. II, Mar. 20-May 22, 1958.

Even if defendants were not to possess substantial bargaining advantages over the Government, and brought no political pressure to bear, permanently secret consent decree negotiations would be difficult to justify. The cloak of secrecy, when cast over public business involving large and powerful corporations, tends to erode public confidence in law enforcement.

Both S. 782 and S. 1088 deal with the abuses inherent in current antitrust consent decree procedure by means of traditional and effective remedies—full exposure of the facts and circumstances, fair opportunity for public participation, and effective supervision by the Court. Both bills require a mandatory delay of at least sixty days in the entry of any consent judgment, provide for public notification of the terms of proposed consent judgments, compel the Justice Department to publicize and publicly deal with comments which are submitted with respect to proposed consent judgments, and substantively involve the Court in the settlement process. S. 782 also requires the defendants to make a detailed disclosure of their relevant lobbying activities—a most salutary reform.

I would like to make two technical suggestions in connection with these bills:

First, in S. 782, it might be wise to recast Section 2 so that subparagraph “(g)” therein will not contain the language “be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under § 4A of this Act.” To illustrate the problem, S. 782 in its present form would render inadmissible in evidence factual representations made by a defendant to induce a Court to accept the defendant’s consent decree proposals. Such representations can amount to admissions against interest, and as such, would normally constitute lawful evidence adducible against the defendant in other proceedings. The defendant’s legitimate rights will be fully protected by the language remaining in the subparagraph whereby the consent judgment itself is kept from becoming evidence pursuant to the general provisions of Title 15, U.S.C. § 16, and lawful evidence which the defendant has chosen to adduce in its own behalf will not be suppressed or made unavailable in other proceedings.

Second, in S. 1088 the final paragraph, subparagraph “(e),” should in my view be changed so as to eliminate the following language: “nor shall anything in this section limit or expand in any way the power of the courts to accept or reject a proposed consent judgment or decree or other settlement of any suit, action, or proceeding arising under the antitrust laws or any other laws; nor shall anything in this section limit or expand in any way the rights of any person intervene in any suit, action, or proceeding arising under the antitrust laws or any other laws.” I think that fairly read, S. 1088 does and should both expand the Court’s power over consent decrees, and also increase the rights of intervenors. If so, the quoted language tends to make illusory a main promise of the bill.

In conclusion, let me state my firm conviction: Either bill would greatly facilitate proper antitrust law enforcement. A meld of the two bills, in the light of the testimony received by this subcommittee, would be most desirable.

MR. ROWLEY. I also would like to take the opportunity to correct Mr. Kramer. I seldom have such an opportunity.

He says that he is the only person to bring some contrary view about the desirability of repealing the Expediting Act. I’d like to have him know he has some company, and that’s in my statement.

SENATOR GURNEY. First of all, let me, again, say to you, Mr. Rowley, as I have to others, I’m sorry the hearings have gone on so long, but we are limited in our time now. Sometimes it works that way and it is not fair to you, but it just has been that way today.

But we certainly do, in regard to your testimony and written statement, it is important and it will be reflected in our deliberations.

Counsel, do you have some questions you would like to ask?

MR. LEVINE. Thank you, Senator. A couple of brief questions in the interest of time.

MR. ROWLEY. Your written statement was certainly the strongest testimony that we’ve received in the 2 days of hearings. I would like

to explore just several of the points that you and the other witnesses have raised.

I take it, from your written testimony, that you do not believe our proposed—Senator Gurney's and Senator Tunney's proposed consent decree changes would constitute a significant burden on the Antitrust Division.

First, I'd like to know if that's an accurate reading of your view.

Mr. ROWLEY. Yes, indeed. I think that it might indeed relieve the Division of a burden of responsibility that it presently bears alone, without the least help from the court.

Mr. LEVINE. One problem that we've had in assessing the position is that we've heard conflicting testimony in the past 2 days as to the extent of the burden that S. 782 would impose.

Could you suggest a manner in which we might accurately assess the extent to which the provision might, or might not, burden the Division; or how we could get—so we could get an accurate handle on the extent of the burden.

Mr. ROWLEY. I really can't, except to suggest that if the Division is doing its job, all of these matters are considered internally and the bill essentially requires that the court be given the same insights that the Division, itself, possesses.

Mr. LEVINE. Thank you.

I know that Senator Tunney wanted to commend you on one particular phrase in your testimony. He referred to the, "reform and regularization of Government consent decree procedure in antitrust cases."

And the Senator commented to me that he believes that your choice of words, "reform and regularization," suggests a very important facet of the proposed public impact statements. Now, that is, that these statements might have to provide something like a common law of consent decree procedures, and that such a common law might be of great value to the antitrust bar and the parties to antitrust lawsuits in litigation.

Do you agree with his thinking in that area?

Mr. ROWLEY. Well, he is very gracious to be so complimentary. I do think this, that the trouble with consent decrees today is that there is no legislative history relating to them.

Now, regulatory agencies frequently are required to publish statements of consideration, which give a legislative history, as it were, to a particular rule or regulation. Consent decrees today have no explanation for the benefit of the public, save the press release, which is normally about 10 percent as informative as the decree itself, and contains no information that goes beyond the decree.

In those circumstances there is no legislative history. We don't know how the telephone decree got entered except on the basis of the Celler committee hearings of 15 years ago. We don't know how the ITT decree got entered, thanks to the operation of the shredding machine.

And there are many, many such matters that lurk in the bushes, that are matter of profound public interest, and that ought to be known to the people, generally, and the courts, in particular, with respect to judgments that bear court approval.

Mr. LEVINE. Today and yesterday we have heard conflicting testimony with regard to subsections 2(d) and 2(e) of the legislation, those subsections which involve the court in making a determination that a consent decree is in the public interest.

What is your view of those subsections 2(d) and 2(e)?

Mr. ROWLEY. I think they are important. I think that in those sections the court is called upon to perform a routine court function. In minority stockholder suits when settlements are proposed, in class actions where settlements are proposed, it is part of court routine for the propriety or the adequacy of the settlement to be a subject of judicial inquiry.

Where major matters of public importance such as are normally involved in most Government antitrust actions are before a court, a court should, at the least, have the benefit of full information, and should, at the least, perform in the public interest by making a proper determination as to the adequacy of the decree.

Short of that, it cannot be anything but a rubber stamp. And today the court is, in the consent decree context, a rubber stamp, and nothing more.

Mr. LEVINE. I assume you would apply that same conclusion to clause (6) of subsection 2(b), the requirement that the proposed public impact statement include a description and evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives?

Mr. ROWLEY. Yes, indeed, because how else can the judge make an informed determination of the adequacy of the decree? Under the antitrust laws, he is not dealing with some vague concept of the public interest, he is enforcing the antitrust laws, or theoretically so doing.

Mr. LEVINE. Fine. And I have two final questions, which are brief.

First, can you fill the subcommittee in on your experience and background in the antitrust area?

Mr. ROWLEY. Yes. I had my first antitrust case in Boston in 1939. It was a private case. In 1945, I entered the service of the Justice Department, and continued in the Department until 1958. The last 4 years of my tenure were as chief of the Trial Section where I served as a competitor to my good friend Professor Kramer, who headed the General Litigation Section.

And I think we did better. We didn't have an A.T. & T. decree in our record.

Mr. LEVINE. Subsequent to that time, you have been involved in antitrust practice?

Mr. ROWLEY. Yes, indeed. I practice here locally and essentially in the antitrust area, strangely enough mostly for defendants, but not defendants who are warding off antitrust blows; rather, defendants who are countersuing and seeking the protections of the antitrust laws.

Mr. LEVINE. Good defendants.

Mr. ROWLEY. I hope so.

Mr. LEVINE. Finally, you indicate that you are against repeal or modification of the Expediting Act, and I understand your viewpoint on this; however, we have been told that the Department of Justice is handicapped in its attempt to obtain preliminary injunctions in sec-

tion 7 cases because the judges are reluctant to grant such a non-appealable order.

Do you favor a law that would apply—that would simply permit temporary injunctions to be appealed to the Circuit Court of the Courts of Appeals?

Mr. ROWLEY. No, sir, I don't, and for this reason: In my experience, a temporary injunction is a dilatory proposition, and if you go after a temporary injunction and lose it, thereafter to appeal merely slows the wheels down.

Mr. LEVINE. Thank you very much.

Senator GURNEY. Thank you, Mr. Rowley.

Mr. BANGERT. Senator, in view of the time, if we could propound questions in writing for this witness, and some of the other witnesses, it would be appreciated.

Senator GURNEY. We could do that, I am sure, if that is acceptable to you, Mr. Rowley.

Mr. ROWLEY. Yes, indeed, Senator.

Senator GURNEY. Thank you very much, and thank you for your patience in waiting.

The subcommittee will adjourn, subject to the call of the Chair.

[Whereupon, the hearing was adjourned at 1:25 p.m., to reconvene at the call of the Chair.]

THE ANTITRUST PROCEDURES AND PENALTIES ACT

THURSDAY, APRIL 5, 1973

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 1:30 p.m., in room 318, Old Senate Office Building, Senator John Tunney presiding.

Present: Senator John Tunney (presiding).

Also present: Charles E. Bangert, general counsel; Peter N. Chumbris, chief counsel to minority; Meldon Levine, legislative assistant to Senator Tunney; Charles E. Kern II, minority counsel; Shirley Johnson, assistant counsel; Patricia Bario, editorial director; and Janice Williams, chief clerk.

Senator TUNNEY. The committee will come to order.

Today we are continuing our hearings on two bills, which would allow the public to participate when the Government settles antitrust cases. One bill was introduced by myself and Senator Gurney, and the other by Senator Bayh.

We are very pleased to have as our first witness this afternoon the Honorable J. Skelly Wright. It is a great pleasure to have you with us, Judge.

STATEMENT OF J. SKELLY WRIGHT, JUDGE, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Judge WRIGHT. Thank you, Mr. Chairman.

I would like to thank the subcommittee for inviting me to appear today, and for permitting me to appear in a dual capacity. I am here, first, to summarize the action taken by the Judicial Conference of the United States on prior proposed legislation similar in some respects to the bills presently before the subcommittee. In addition, the subcommittee has kindly given me the opportunity to express my personal views on the pending legislation.

Beginning in 1957 and through 1967, the Judicial Conference has, upon the recommendation of its then-Committee on Revision of the Laws, approved bills requiring that notice be published in the Federal Register of any proposed antitrust consent decree at least 30 days before its entry.

The rationale behind this legislation was quite simple. The Conference felt that it would be helpful if the district court could obtain the views of all persons who might be affected by the proposed decree before it was finally formulated and entered.

None of these bills ever became law, perhaps because in 1961 the Department of Justice issued regulations embracing the principle of public notice of proposed consent decrees.

Pursuant to these regulations, the Department files in court proposed consent judgments at least 30 days prior to entry by the court. It is also accepted practice, though not expressly required by the regulations, to issue some form of press release at the time of filing to further insure meaningful public notice.

The public notice provision in S. 782 in effect incorporates both the bills approved by the Judicial Conference and the procedure adopted by the Department of Justice. The bill requires that proposed consent decrees be filed with the court and published in the Federal Register. The notice period in the bill is extended from 30 days to 60 days.

Another feature of S. 782 having an antecedent in bills approved by the Conference is the proposed revision of the Expediting Act. In September 1968, the Conference approved in principle S. 2721 of the 90th Congress, relating to amendments of the Expediting Act.

The Conference, however, made two exceptions to its approval. First, the Conference was of the view that three-judge district courts should be completely eliminated in the antitrust area.

Also, the Conference felt that no interlocutory appeal should be permitted under title 28, section 1292(b). In response to the Conference's objections, the Department of Justice submitted to the Conference a new draft bill, which was approved in principle by the Conference in October 1969, the two objections to S. 2721 having been eliminated. Section 4 of S. 782 is identical to the Department of Justice draft approved by the Conference.

Aside from these two provisions concerning public notice and the Expediting Act, the provisions of S. 782 differ from any legislation approved by the Conference. Neither the Conference nor any of its committees have yet had an opportunity to study the pending legislation. The remainder of my remarks, therefore, represents my personal views on the pending legislation, and not necessarily the views of the Conference.

The consent decree provisions of S. 782 recognize and attempt to satisfy a need for additional participation by interested parties in the approval of consent decrees. In part, this need arises from the sheer complexity of antitrust litigation.

The Antitrust Division of the Department of Justice, while no doubt among the most competent and dedicated groups of professionals in Government service, nevertheless is made up of human beings and, unfortunately, human beings occasionally make mistakes.

In approving a particular decree, the Justice Department attorneys may overlook certain issues, ignore certain concerns, or misunderstand certain facts. The participation of additional interested parties in the consent decree approval process helps correct these oversights.

The Department itself has modified consent decrees on a number of occasions as a result of public comment. A good example is the decree entered in the case of *United States v. Ling-Temco-Vought*. In that case, employees and pensioners concerned with the effect of the proposed decree on their respective interests sent numerous letters to the court and, as a result, the court approved the proposed consent decree

only on condition that the parties undertake to provide appropriate safeguards for the interests of the employees and the pensioners.

More importantly, the need for additional participation by interested members of the public stems from the underlying balance, or one might say imbalance, of power in antitrust litigation.

By definition, antitrust violators wield great influence and economic power. They can often bring significant pressure to bear on Government, and even on the courts, in connection with the handling of consent decrees.

The public is properly concerned whether such pressure results in settlements which might shortchange the public interest. Instances of such concern include the recent ITT consent decree with which the subcommittee is fully familiar.

Another example is the resolution of the El Paso Pipeline litigation. This case, in 1967, involved judicial approval of a decree proposed by the Government after a successful trial, rather than a consent decree, and one might have expected the Justice Department to be more immune from pressure in this situation.

But in describing the manner in which the Department had handled the case, the Supreme Court felt compelled to say that—and I am quoting—"The United States knuckled under to El Paso and settled this litigation"—close quote, rather than fully protecting the public interest by getting a decree which fully insured future competition.

Not only had the Justice Department succumbed to pressure, in the opinion of the Supreme Court, but so willing was the district judge to accede to the convenience of El Paso in approving a decree that the Supreme Court was forced to take the unusual step of ordering that a different judge be assigned to hear the case on remand.

Settlement of civil antitrust litigation through consent decrees is, of course, a legitimate and probably vital aspect of antitrust enforcement. Were the Government forced to carry each of its cases through to trial, overall effectiveness would, no doubt, suffer.

Nevertheless, it is important to remember that the consent decree is an enforcement device based on the principle of compromise—compromise by both the defendants and the Government.

And because of the powerful influence of antitrust defendants and the complexity and importance of antitrust litigation, the public reasonably asks in many instances whether, in reaching a settlement, the Government gave up more than it need have or should have.

Some response to this public concern is desirable, in my opinion, not only to insure that the compromise struck by the Justice Department is fair from the public's point of view, but also to alleviate fears which, even if unfounded, are unhealthy in and of themselves.

One developing response to this problem in recent years has been an increasing willingness of district courts to shoulder the burden of making an independent determination as to whether a particular settlement is in the public interest.

Not too long ago, it was fair to say that district courts "rubber-stamped" proposed consent decrees. Some still do. Now, in contrast, many courts commonly attempt to ventilate the pros and the cons of particular settlements, primarily by allowing the Justice Department, the defendant, and a wide range of outside interested parties to ex-

press their views through briefs and oral arguments. And in some instances, courts have rejected proposed decrees because they inadequately protected the public interest.

This increased judicial scrutiny, in my opinion, has had a salutary effect. It encourages the Department of Justice to be careful in arriving at a consent decree in the first place.

Moreover, even after agreement between the parties, decrees have been modified and improved. What is most important, however, is that these salutary effects have been achieved without sacrificing the viability of the consent decree as a settlement device.

Where the court has disapproved a decree, the Government has come back with a modification acceptable to the court. Increased judicial scrutiny has not forced the Government to go to trial with more of its cases.

S. 782, in my view, may best be viewed as an attempt to ratify and to codify this development in the law. S. 782 has two key provisions. First, it expressly authorizes the district courts to approve a decree only after determining that it is in the public interest.

Second, it permits the court to employ a variety of techniques to get the information it needs to make that determination. If the bill can attain these objectives while preserving the consent decree as a viable settlement option, I think it makes good sense. If the achievement of these objectives, however, will preclude consent decrees in large numbers of cases, I think it will work more harm to the public interest than good.

Prosecutorial resources are finite, and the Government has a legitimate interest in getting decrees in the large percentage of cases without going to trial and without devoting the same amount of time and resources as would be required in a trial.

I believe, therefore, that the principle of increased judicial scrutiny of consent decrees and the Government's interest in avoiding trial are not mutually incompatible, though I would like to note, in this connection, certain reservations I have as to specific features of S. 782.

In listing the factors to be considered by district courts in approving decrees, I believe the bill may overemphasize the public interest in having a case go to trial so that any resulting judgment may be used as *prima facie* evidence in a subsequent private antitrust action.

The primary focus of the Government's enforcement effort should be to obtain a decree which protects the public by insuring healthy competition in the future. The district court, in my view, should not be encouraged to disapprove an otherwise adequate and effective consent decree simply on the ground that forcing the case to go to trial would aid private parties in obtaining damages in private litigation.

No doubt, one of the purposes of the Government's civil antitrust action is to provide aid to private litigants thought to have inadequate resources. That is why we have the *prima facie* presumption in section 5(a) of the Clayton Act.

But this same objective might just as well be served in some other manner more consistent with the Government's interests in not having to dissipate its resources in trials in many cases.

One increasingly common practice is for the court to condition approval of the consent decree on the Government's making available

to potential private plaintiffs information and evidence obtained by the Government, including some grand jury investigations, which will assist in effective prosecution of private actions.

In this manner, the needs of all three groups can be accommodated. The Government can have the decree without the risk, delay, and expense of going to trial; the defendants can have a settlement without an adverse presumption following them into the private action; and the plaintiffs can have some assistance in the prosecution of their private claims.

Accommodations such as these should be encouraged. In any event, if the district court is authorized to consider the effect of a consent decree on private parties, it should also be expressly authorized to weigh the public interest in having a decree without undergoing the risk, delay, and expense of a trial.

Also, if the inquiry into whether the proposed decree serves the public interest turns into a long minitrial of the antitrust case, the value of the consent decree to the Government diminishes. It seems imperative that, if the consent decree is to retain its vitality, the trial court must adduce the necessary information through the simplest and least time-consuming means possible.

Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral argument, this is the approach that should be used. Only where it is imperative that the court should resort to calling witnesses and other time-consuming factfinding techniques should the court do so.

Some balancing is required in this area, and I believe the bill, or its legislative history, should emphasize the trial court's broad discretion to limit the procedures used to obtain the information necessary to make an informed public interest determination without turning the consent decree approval process into a long minitrial.

The three other significant features of S. 782 concern the filing of a public impact statement, the filing of a statement describing communications between the defendant and Government officials, and the change in the maximum fine in criminal antitrust cases.

The public impact statement should, in my view, and would, in my view, help assure meaningful public notice and participation in the consent decree approval process. It will also insure that the Government, the Department of Justice itself, has given enough thorough consideration to the public interest by going down the line on the considerations outlined in the impact statement. The Government can thereby assure itself that it is protecting the public interest by offering the proposed decree.

Hopefully, it would serve as a focal point for debate on the proposed decree, and would, therefore, aid the court in making its ultimate public interest determination.

The required statement on communications between the defendant and Government officials is most desirable. All but a few of such communications are, no doubt, perfectly proper, but the improper few cast a shadow of mistrust on the whole, and trying to sift the good from the bad after the fact, when memories have begun to fail, is often an impossible task.

Other than the settlement negotiations themselves, which involve communications by the defendant's attorneys of record and are already excluded under S. 782, all communications to Government officials, including communications to Department of Justice authorities, should be disclosed.

As to the increase in the maximum fine, there is apparently widespread agreement that the present maximum is not a sufficient deterrent to a large corporation. One wonders whether even the threat of a \$500,000 fine would have deterred some of the multimillion-dollar schemes laid bare in past antitrust cases, but the change is certainly a step in the right direction; \$5 million would be more realistic. After all, it is only a maximum.

I would like to close my remarks with some comments on S. 1088, the other bill pending before the subcommittee. This bill employs a different public notice procedure than does S. 782 or the regulations of the Department of Justice, requiring notice to be effected through publication in newspapers of general circulation.

Considering the likely expense of this requirement, the notice provisions of S. 782 seem to make more sense. Antitrust litigation is of sufficient public interest that the filing of a proposed decree in court and publication in the Federal Register, along with the Department of Justice's press release, will provide adequate notice to persons likely to desire participation in the decree approval process.

A significant weakness of S. 1088 is that it does not expressly preclude district court approval of a proposed decree unless it finds that it is in the public interest to do so. While the bill requires a court to hold a hearing to determine whether the settlement should be allowed to become final, it expressly provides that it does not expand in any way the power of the courts to reject a proposed decree.

I think it is important that the Congress approve the growing trend toward increased judicial scrutiny, and I trust that if it does so, the courts will use their discretion wisely and protect the interests of the Government as well as the interests of the public. Indeed, in a democracy, the interests of both are ultimately one and the same.

Thank you, Senator.

Senator TURNER. Thank you, Judge Wright. I can't tell you how much the committee appreciates the fact that you would be here today testifying, and that you would have given such careful consideration to the legislation that is presently under consideration by the committee.

I certainly agree with your statement at page 3 of your testimony that participation—I'm quoting—"participation of additional interested parties in the consent decree approval process helps correct these oversights," that lawyers from the Antitrust Division, being human, might "overlook certain issues, ignore certain concerns, or misunderstand certain facts."

And I am very happy that you share my concern. With this in mind, I am interested in pursuing with you, briefly, the thrust of your testimony pertaining to the decreasing tendency of courts to rubberstamp proposed consent decrees.

You testified that you believe that the practice is declining and that you recognize that S. 782 is an attempt to ratify and codify a development that already is underway.

How much, Judge Wright, do you believe that the process will continue without provisions such as those in S. 782?

Judge WRIGHT. That, unfortunately, would depend on the wisdom of each individual Federal judge to whom a consent decree is presented for his approval.

Some judges are knowledgeable in the area of antitrust and would take more interest in determining whether or not a consent decree is in the public interest.

On the other hand, as I have indicated, antitrust litigation is very complex litigation. Most Federal judges serve a lifetime on the bench without trying one case and, consequently, they are really ignorant of the issues and even the law, to some extent, involved in antitrust cases.

And, consequently, unless they have the light from outside, the light from the public as well as from the Attorney General who also, of course, represents the public, and the defendants in interest in the case, there is always the possibility that a judge, through his inability to grasp the issues and the importance of the concessions being made by both sides in the consent decree, will sign a decree that is not in the public interest.

So I would suggest that the Congress would be well advised, with all respect, to recognize and codify this growing tendency to judicially scrutinize these proposed decrees.

Senator TUNNEY. I couldn't agree with you more, and somebody with your knowledge and expertise supporting this kind of a provision lends great weight to the arguments that have been made by people with lesser knowledge in favor of it.

I noticed at page 7 of your written testimony that you indicated that, "if the inquiry into whether the proposed decree serves the public interest turns into a long minitrial of the antitrust case, the value of the consent decree to the Government diminishes."

From your judicial background, your experience, what chances are there of the proposals contained in S. 782 leading to minitrials in which the interests of the public would be subverted?

Judge WRIGHT. Well, there is a chance of this kind of thing happening, also dependent on the Federal judge to whom the case falls.

In a routine antitrust settlement situation, there really won't be a lot of expertise required to approve or disapprove intelligently the proposed consent decree.

Indeed, in many cases, I would think, and have seen, no opposition filed, where the case is of great national importance, then time should be taken—court's time and counsels' time should be taken to study the decree, to get information from the public concerning the ramifications of the decree, the anticipated results of the decree and, in my judgment, this time is well spent, even though it might take days, even though it might take weeks; it could have a trial that would last months and months.

So, to suggest that S. 782 will not require judicial time and counsel time would be misleading. In important cases, S. 782 would require judicial time, necessarily so, and I believe rightfully so.

A judge who can handle his calendar, who has a knack of getting to the heart of matters, can reach into these unstructured situations such

as are presented by the application for the court's signature on a consent decree and, with a minimum of time, determine where the public interest really lies.

One of the problems is there is no structure to this approval process. In the trial of a case, we do have structure. We know where it begins, we know how it proceeds, and we know where it ends.

But in the approval process for an antitrust consent decree, we have no such guidelines and the ingenuity of the particular judge to whom the case is assigned will determine in large measure not only whether or not the public interest is adequately protected but just how much time it will take.

Senator TUNNEY. Do you think that the public impact statement would help provide such guidelines?

Judge WRIGHT. Yes, definitely, I think it will. The public impact statement, first of all, is detailed notice to the public what the case is all about.

Further than that, the public impact statement makes the lawyers for the Department of Justice go through the process of thinking and addressing themselves to the public interest consideration in the proposed decree.

There is no better exercise for determining whether you are right or not than trying to put it down on paper to see how it writes.

In writing an opinion for a court, you can make up your mind in advance but, if the opinion won't write, you are going to change your mind, and I suspect that this impact statement might perform the same service for Department of Justice lawyers who are supporting the consent decree.

Senator TUNNEY. In light of your testimony that the bill, or at least the legislative history, should emphasize the trial court's broad discretion, would you favor elimination of subsection 2(e), that subsection which suggests optional means by which the court can determine whether the proposed decree is in the public interest, and the retention of a simpler test, for instance, that it is in the public interest?

Judge WRIGHT. Well—

Senator TUNNEY. 2(e): "In making its determination under subsection (d), the court may (1) take testimony of Government officials or experts * * *"; you appoint a special master, authorize full or limited participation in proceedings before the court by interested persons or agencies, review any comments or objections concerning—

Judge WRIGHT. Well, I would think that that particular approach should be reserved to the most important case of nationwide interest. It seems to me that, to indulge in this kind of procedure in a great number of consent decree cases, would really paralyze the process.

I think a court should strain in even the most important cases to—even the most important cases—to avoid the reference to a master.

That is a reference that is always fraught with delay, as well as many other things, so masters ought to be kept out of this process as far as they possibly can.

And as far as taking testimony is concerned, even that should be limited, if, indeed, it is used at all.

My point really is that an experienced judge, who does have the facility of getting to the point and getting others to get to the point,

can arrive at a public interest determination in most cases without using the kinds of tools that are provided and referred to in, I think you said, (e), whatever you read.

I realize that in some cases that type of thing might well be necessary; in a very important, nationwide, complex, antitrust situation, that kind of thing might well be necessary, but I would certainly hope it would not be used often.

Senator TUNNEY. Well, Judge, I really appreciate your testimony, and I think that you have been most helpful to the committee, a person of your stature coming in and supporting many of the basic principles upon which this bill was founded and the mechanisms that are established in the bill to achieve its purposes.

Does minority counsel have a question?

Mr. CHUMBRIS. I have two things, Mr. Chairman. One, Judge, you mentioned the fact that the Supreme Court in this decision ordered that, when the case went back, a new judge would be appointed. Now, that, I believe, would be disturbing to the Judiciary Committee, Mr. Chairman, because in the 22 days of the hearings on Mr. Kleindienst's appointment as Attorney General, Mr. Bangert and Mr. O'Leary for the majority and I for the minority, sat through those 22 days of hearings because there was an antitrust issue involved. We heard many references against the Department of Justice as being influenced by outside forces, and their political appointees and in the political sphere.

Here we have a Federal judge who has a lifetime appointment on the theory that he won't be interfered with. And the Supreme Court decides that he should not hear that case, and should go to another judge.

Is there anything more that could be added to the record, because that leaves an inference?

Judge WRIGHT. Well, let me say this. You have an expert on that case sitting in this room, and he is going to follow me, as I understand, to the witness stand. You have Professor Turner, who was then Assistant Attorney General in charge of the Antitrust Division at the time the El Paso case was before the Supreme Court.

As I understand it, this case was not prepared under the guidance of Professor Turner, and he came in at the bitter end of it, and he tried to patch up the pieces. But I think that Professor Turner can tell you a lot more about that case, than I can tell you about that case. He has some views that he expressed to me, and I'm sure he would like to express to you.

Mr. CHUMBRIS. Fine. There's one other point on the Expediting Act, if I may refer to that for a moment. The Senate passed one version, and the House passed another version in the 91st Congress. It went to House-Senate conference, but they could not resolve that difference.

And one of the significant differences between the two bills was the fact that the Senate struck out the authority of the Attorney General to certify.

And the question I wanted to ask you is this. I understand in 1963, the judicial conference recommended that the present law be revised, but stated in that recommendation that the Attorney General should

not have an unqualified right to file such certification when such right is denied to the defendant.

Do you know whether, going back to 1963, that was the recommendation of the Judicial Conference, or could you furnish that for the record of this subcommittee.

Judge WRIGHT. My recollection is that it was, and I'll furnish it to you. However, the Judicial Conference has changed its mind if it was the recommendation back in 1963.

As I indicated in my testimony, the Judicial Conference has approved a Department of Justice draft of amendments to the Expediting Act, which is precisely in *hale verba* the provisions in S. 782.

Mr. CHUMBRIS. The only difficulty is that some of the Senators on this subcommittee and on the full committee are just as adamant about their position in the Senate bill. And Mr. Chairman, may we have this issue in our official record, because we are going to have to ventilate this in subcommittee, and I know how strongly several Senators feel about the Senate version as against the House version. I ask unanimous consent that the bill as passed by the Senate itself be placed in the record for future reference. Thank you very much, Judge Wright, and thank you, Mr. Chairman.

Mr. TUNNEY. Without objection, so ordered. Thank you, Mr. Chumbris.

[The document follows:]

Calendar No. 1225

91ST CONGRESS }
2d Session }

SENATE

{ REPORT
{ No. 91-1214

AMENDING EXPEDITING ACT

SEPTEMBER 21, 1970.—Ordered to be printed

Mr. ERVIN, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 12807]

The Committee on the Judiciary, to which was referred the bill (H.R. 12807) to amend the act of February 11, 1903, commonly known as the Expediting Act, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

On page 3, line 11, after the word "of" strike all down to and including the word "justice" on line 19 and insert in lieu thereof "justice."

On page 3, lines 20 and 21, strike "or (3) or a certificate pursuant to (2)".

PURPOSE OF THE AMENDMENTS

The purpose of the amendments is to provide that appeal from a final judgment in a civil antitrust action brought by the United States shall lie directly to the Supreme Court on a finding that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice by order of the district judge upon application of a party.

PURPOSE

The purpose of the proposed legislation, as amended, is to amend the Expediting Act so as to require that final judgments and interlocutory orders in certain civil antitrust cases if appealed, be heard by the circuit courts of appeals.

The bill would amend section 1 of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) providing for a three district judge court in civil actions wherein the United States is the plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, upon the filing by the Attorney General with the district court of a certificate that the cases are of general public importance. The proposal would eliminate the provision that a three judge court be impaneled. It would however retain the expediting procedure in single judge district courts.

The proposal would amend section 2 of the Expediting Act (15 U.S.C. 29, 49 U.S.C. 45), providing that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section 1 of the Expediting Act will lie only in the Supreme Court. Under the proposal only those cases of general public importance would be appealable directly to the Supreme Court and normal appellate review through the courts of appeals with discretionary review by the Supreme Court would be substituted therefor. An appeal shall lie directly to the Supreme Court on a finding that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice by order of the district judge upon application of a party. The proposal also would eliminate the reference in existing law to expedition of civil cases brought by the United States under the original Interstate Commerce Act and subsequent statutes of like purpose.

STATEMENT

The Expediting Act became law in 1903, a time when the Sherman Act was relatively new and an untried method of restraining combinations and trusts. There was apprehension that the newly created system of courts of appeals, because of their supposed unfamiliarity with the new law and because of the additional time required by their procedures, would delay and frustrate the efforts to control monopolies. Responding to that concern the Attorney General recommended the expediting legislation and it became law after Congress approved it without debate.

One of the principal arguments offered in support of the proposal is to relieve the Supreme Court of the burden of hearing the numerous cases coming to it under the Expediting Act. Many civil antitrust cases require the Supreme Court to read thousands of pages of transcript from the district court. A question arises as to the adequacy of the review the Supreme Court can give to those cases in which there are voluminous trial records. Almost all the present Justices have, both in and out of Court, asked that these cases go first to the court of appeals. Some of the Justices are of the opinion that adherence to the customary appellate procedure would benefit the Supreme Court by reducing the numbers of matters presented to it. Further, having the initial appellate review in the courts of appeals would be of benefit to the litigants by refining the issues presented to the Supreme Court and also give litigants an opportunity of review of the district court decrees which are seldom reviewed by the Supreme Court under existing practice.

It is generally conceded that the existing law has permitted more expeditious determinations of civil antitrust cases but the factual situation prevalent when the law was enacted no longer obtains: dilatory practices, such as protracted delays in filing appeals, are not now available. Additionally, by permitting appellate review of preliminary injunctions more expeditious treatment of merger cases should obtain since the trial court's decision would be subject to an immediate review prior to a full-blown trial on all the issues.

The committee is of the opinion that the proposed legislation provides a suitable means of meeting the problems arising from the Expediting Act and would assure that the interest of all parties would be protected. Accordingly the committee recommends favorable consideration of H.R. 12807 with amendments.

Attached hereto and made a part hereof are the views of the Department of Justice:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C.

The VICE PRESIDENT,
U.S. Senate, Washington, D.C.

DEAR MR. VICE PRESIDENT: There is enclosed a proposed bill to amend the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 28 and 29, 49 U.S.C. 44 and 45.

The bill would streamline judicial procedure in antitrust litigation and institute procedure for appellate review of interlocutory orders on injunctions.

The bill would amend section 1 of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) which provides for a three-judge district court in civil actions where the United States is a plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, when the Attorney General files with the district court a certificate that the case is of general public importance. The section also provides that the hearing and determination of such cases shall be expedited. The amendment would eliminate the provision that a three-judge court be impaneled when the Attorney General files his expediting certificate, but would retain the expediting procedure in single-judge district courts.

The bill would amend section 2 of the act (15 U.S.C. 29, 49 U.S.C. 45), which provides that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section 1 of the Expediting Act will lie only in the Supreme Court. The amendment would eliminate direct appeal to the Supreme Court in such actions for all but cases of general public importance, substituting normal appellate review through the courts of appeals with discretionary review by the Supreme Court. The amendment provides that any appeal from a final judgment in a Government civil case under the antitrust laws, or other statutes of like purpose, and not certificated by the Attorney General or the district court as requiring immediate Supreme Court review, will be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to section 1292(a)(1) and 2107 of title 28 of the United States Code, but not otherwise. Any judgments entered by the courts of appeals in such

actions shall be subject to review by the Supreme Court upon a writ of of certiorari.

The amendment also provides that an appeal and any cross-appeal from a final judgment in such proceedings will lie directly in the Supreme Court if, not later than 15 days after the filing of a notice of appeal, (1) upon application of a party, the district judge who decided the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice, or (2) the Attorney General files in the district court a certificate containing the same statement. Upon filing of such an order or certificate, the Supreme Court shall either dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law or deny the direct appeal and remand the case to the court of appeals. Review in that court could then go forward without further delay. This is similar to the procedure of the Criminal Appeals Act (18 U.S.C. 3731).

It is desirable, however, that the possibility of immediate review by the Supreme Court be preserved for cases of general public importance in the administration of justice. Such cases will usually involve novel legal questions pertaining to the interpretation or enforcement of the antitrust laws or may have serious legal or economic consequences going beyond the mere private interests of the individual litigants.

The determination of whether a case should be certified directly to the Supreme Court can best be made by the Attorney General or the trial judge who decided the case. It is the public interest in effective antitrust enforcement which primarily dictates the need for any direct appeals, and it is the Attorney General—the chief law officer of the United States—who is in the best position to determine what the total enforcement picture is with respect to a particular case. Though defendants' private interests, which may be of substantial private importance, would not afford a basis for direct appeal to the Supreme Court, the trial judge who heard and decided the case can best evaluate a defendant's claim that immediate Supreme Court review is of general public importance in the administration of justice.

The bill's provisions requiring the Attorney General or the district judge to file the certificate within 15 days after either party has filed its notice of appeal will assure that the opposing party is promptly notified that a direct appeal is involved. And the routing of both appeals and cross-appeals to the Supreme Court by the filing of the certificate will eliminate the delay and confusion of piecemeal appeals.

There is presently considerable uncertainty as to whether the interlocutory appeal statute, 28 U.S.C. 1292(a), is available in cases falling within the Expediting Act. The circuits of the courts of appeals are split on this question (compare *United States v. Ingersoll Rand*, 320 F. 2d 509 (3d Cir. 1963), with *United States v. F.M.C. Corp.*, 321 F. 2d 534 (9th Cir.), application for temporary injunction denied, 84 S. Ct. 4 (1963) (Goldbert, J., in chambers), and *United States v. Cities Service Co.*, No. 7216 (1st Cir., May 8, 1969)), and we think it appropriate to resolve this question with clarifying legislation.

We strongly believe in the desirability of appellate review of district court orders granting, modifying, or denying preliminary injunctions. Such review is generally limited to the outset of a case and would not cause undue delay or disruption. This district court's discretion on

injunctions can be reviewed, in substantial part, separately from a determination of the ultimate merits of the case and court of appeals review is not, therefore inconsistent with subsequent direct Supreme Court review of the final judgment in the event of certification. Moreover, the immediate impact of injunctive orders, whether the injunction is granted or denied, calls for appellate review as a matter of fairness. The public interest that possibly unlawful mergers not be consummated until their validity is adjudicated, in addition to the obvious desire of private business to avoid a costly and complicated unscrambling, would, in our view, benefit from making the provisions of 28 U.S.C. 1292(a)(1) available in Expediting Act cases.

These considerations do not apply to appeals of interlocutory orders not relating to injunctions pursuant to 28 U.S.C. 1292(b). That section permits interlocutory appeal of any order made at any time during the district court proceedings, to which that court appends the statutory findings (although the court of appeals may, in its discretion, decline to allow the appeal). One reason against applicability of section 1292(b) is the desire to avoid undue delay and disruption. Antitrust cases are often lengthy and complex, containing sufficient obstacles to expeditious conclusion without increasing the possibilities of interruption for interlocutory appeals. A second reason is the inappropriateness of review of controlling questions of law by a court which later may never get review of the final judgment. The theory of 1292(b) is that the appellate court should have an opportunity to rule early, before getting the final judgment, on questions that may be decisive. It would be anomalous for the courts of appeals to undertake interlocutory resolution of such issues when, at the end of trial, if a certificate is filed, the final judgment would go directly to the Supreme Court.

Finally, we think no useful purpose is served by retaining enforcement proceedings under the Interstate Commerce Act or the Communications Act within the scope of the Expediting Act. The Interstate Commerce Act is expressly included in section 1 of the Expediting Act, while section 401(d) of the Communications Act (47 U.S.C. 401(d)) makes the Expediting Act applicable to cases brought by the United States under sections 201-222 of the Communications Act. We see no need for direct appeal in such cases—indeed, these provisors have rarely been invoked. Therefore we propose that references to the Interstate Commerce Act be stricken from the Expediting Act and that section 401(d) of title 27 be repealed.

The Bureau of the Budget advises that there is no objection to the presentation of this proposed bill from the standpoint of the administration's program.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

That section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, **[**"an Act to regulate commerce," approved February 4, 1887,**]** or any other Acts having like purpose that *have been or hereafter may be enacted*, wherein the United States is plaintiff and *equitable relief is sought*, the Attorney General may file with the **[**clerk of such**]** court, *prior to the entry of final judgment*, a certificate that, in his opinion, the case is of general public importance. **[**a copy of which shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge) of the circuit in which the case is pending.**]** Upon **[**receipt of the copy**]** *filing* of such certificate, it shall be the duty of the **[**chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof.**]** *judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."*

SEC. 2. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

[In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from—the final judgment of the district court will lie only to the Supreme Court.**]**

"(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

"(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if:

(1) upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by

the Supreme Court is of general public importance in the administration of justice:

~~(2) the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.~~

~~A court order pursuant to (1) or a certificate pursuant to (2) must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross-appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross-appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."~~

SEC. 3. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) The proviso in section 3 of the Act of February 9, 1903, as amended (32 Stat. 848, 849; U.S.C. 4943), is repealed and the colon prededing it is changed to a period.

SEC. 4. The amendment made by section 2 shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

Mr. BANGERT. Judge, on page 2 of your statement, you indicated that the Conference felt that no interlocutory appeal should be permitted under 28 U.S.C. My understanding is that the Department of Justice position, with respect to the Expediting Act, at least last year, was that it was because of the interlocutory appeal section that they wanted the Expediting Act. And I'm wondering if you know why the Conference felt that interlocutory appeal should not lie.

Judge WRIGHT. I think you are confusing two sections there. What the Department of Justice wanted was an appeal in the case that a preliminary injunction was denied. Now, there is provision for such an appeal under 28 U.S.C. 1291 (a) (1).

And the provisions in S. 782 provide for such an appeal. The section which the judicial conference objected to in the first Department draft was title 28, section 1292(b), which is indeed an interlocutory appeal, but it is a broad interlocutory appeal which is directed at particular issue which might resolve the case without further trial.

And it is really unrelated to what we are talking about here. The reason why the Judicial Conference was against it was because if these interlocutory appeals are allowed, it would delay further the antitrust proceedings which already take too long. That's the reason why the Judicial Conference was against it.

But 1292(b) has no relation whatever to the appealability of a judgment against the Government in connection with the denial of a preliminary injunction. That is preserved in S. 782, and it is approved by the Judicial Conference.

Mr. BANGERT. Thank you.

Senator TUNNEY. Thank you for clearing up that point, Mr. Bangert. Thank you very much, Judge.

Senator TUNNEY. Our next witnesses are Ralph Nader and Mark Green, and I would like to just say at this point that I have been handed a note that the chairman of the Senate Judiciary Committee has called an executive session of the committee for 3 p.m. in the Capitol.

It is my understanding that the hearings could continue, even without my presence, isn't that the case?

Mr. BANGERT. Yes, Mr. Chairman. Mr. Chumbris says the minority has no objection.

Senator TUNNEY. That would be fine, if we could, because we have witnesses from out of town and it is very important that we hear their testimony, and I will try and get back as quickly after 3 o'clock as possible—I don't know how long the executive session will last.

But at any rate, we will continue the hearings past 3 o'clock.

Professor Turner came in from Cambridge.

I think that what we will do—I don't know how long this executive session is going to take. I believe it is an executive session that relates to the Pat Gray confirmation.

However, we now have 45 minutes until 3 o'clock, so why don't we proceed and we'll just do the best we can to get through this afternoon, and I'll come back as quickly as possible because I very much want to ask questions.

It is good to see you again. Thank you for coming down.

Mr. Nader, would you and Mr. Green come forward, please?

STATEMENT OF RALPH NADER AND MARK J. GREEN

Mr. NADER. Thank you, Mr. Chairman.

With me this afternoon is Mark Green, who is a coauthor of the "Closed Enterprise System," which is a study largely on antitrust enforcement at the Federal level.

We appreciate the invitation to comment on the legislative dividends of last year's ITT hearings. While the media's attention was then riveted on the personalities and the real politik of ITT's maneuverings, it is well this subcommittee is now seeking to reform the process those conglomerates sought to pervert.

But at least let us give ITT its due, for it has exposed for all to see the weaknesses and failings inherent in the antitrust consent decree process.

Eighty-three percent of all civil antitrust cases brought in the 1960's were settled by consent decrees, and this rate, if anything, has been increasing.

Yet despite the statistical fact that consent decrees form a cornerstone of antitrust enforcement, the process has until recently been little examined and little understood.

Perhaps as a consequence, it has suffered from procedural and substantive debilitations.

Procedurally, it has been a secret process, as bargaining sessions with powerful corporations, who often did not recognize the niceties of due process procedures, took place far from public view.

Often only the top officials of the Antitrust Division would be in attendance, without the staff who had developed the case.

Since fungus germinates in unlit places, it was not unreasonable to question whether the results of the consent decree process were always in the public interest. One always had to rely on the knowledge and the reliability to service that public interest by the civil servant.

I don't think our Government can be premised on that excessive degree of reliance, no matter who holds the post in whatever department or agency may be involved.

These same concerns led a 1959 House Antitrust Subcommittee, presaging the proposal we consider today, to recommend that every consent decree be accompanied by an Antitrust Division statement articulating, (a) its views of the facts of the case, (b) the goal the decree seeks to achieve, and (c) a detailed interpretation of the key provisions.

The 1961 reform of a 30-day "waiting period" was a nice gesture toward public accountability, but little more than a gesture.

The comments were received after the Government and defendant had agreed, not before, making what Alfred Norse Whitehead once called "the options for revision" more difficult by the Government.

Since little had changed by 1967, 8 years later, Chairman Emmanuel Celler wrote to remind Donald Turner, then head of the Antitrust Division, of his subcommittee's recommendations.

In reply, Turner conceded that "it may well be we could and should supply more information than we have been accustomed to, particularly in explaining the purposes of the decree and the expected impact of the relief obtained."

But he did not change his agency's policy because, like Mr. Kauper, he enjoyed the unfettered discretion of settling antitrust cases. "The reason they like consent decrees is that they can run those operations," a former Division attorney complained to us.

I am sure that the heads of the Antitrust Division would comment on their behalf that they have been entrusted with this responsibility; therefore, they are entitled to this kind of discretionary process in relative privacy.

Substantially, however, they did not always "run those operations" so well. Although the 1941 case, *United States v. Atlantic Refining Co.*, charged 22 major vertically integrated oil companies, 379 of their subsidiaries, and the American Petroleum Institute with a vast array of antitrust violations, and although the original complaint sought sweeping divestitures in the oil industry, the eventual consent decree contained no antitrust relief whatsoever.

The 1956 consent decree in the *ATT-Western Electric* case, which permitted the telephone communications monopoly to retain its telephone manufacturing monopoly, is a demonstrable sellout, as many commentators agree.

Oftentimes these consent decrees are imbedded in concrete, almost impossible to reopen, which also argues for a more open process prior to their solidification.

The negotiated relief decree, following the heralded *Von's Grocery Store* case, showed how to snatch defeat from the jaws of victory; it ordered Von's to divest a certain number of acquired stores, but failed to specify which stores, so Von's happily unloaded its 40 least profitable outlets.

Relief in the El Paso merger case was attacked by the Supreme Court, which in language unique for that body accused the Antitrust Division of "knuckling under" to El Paso Natural Gas.

And the 1969 consent decree in the "Smog Case" contained no affirmative provision requiring the auto industry to undo its past damage, for example, by retrofitting antiemission exhaust devices on cars in the California market, where the conspiracy had been primarily aimed, in its earlier years, certainly.

Students of the consent decree process have concluded that its problems are more endemic than episodic. Economist Kenneth Elzinga analyzed the relief obtained in Antitrust Division and FTC merger cases in the 1955 to 1964 period, breaking them down to four categories: Successful relief, sufficient relief, deficient relief, and unsuccessful relief.

Of the 39 cases in the sample, Elzinga found that 21 relief orders were unsuccessful and 8 deficient. Approximately three-fourths of all the cases, including 7 of 12 Antitrust Division cases, fell within the combined unsuccessful-deficient categories.

Available data indicated that Government complaints in his sample were brought against acquisitions worth \$1.13 billion; \$327.9 million worth of assets were eventually divested—a combined batting average of .290.

A second major study of merger relief—by Pfunder, Plaine, and Whittemore, who surveyed 114 of 137 section 7 cases between 1950 and 1970—came to very similar conclusions.

It was also in this period, Mr. Chairman, in the 1950's and also the 1960's, that the manpower level in the judgment section of the Antitrust Division was not only low, but rather inactive in surveying the compliance with these consent decrees.

One might even go so far as to say most of these hundreds and hundreds of consent decrees were hardly looked at, and they weren't helped at all by the absence of active reporting of progress or compliance by the defendants.

There is one consent decree—the motion picture decree—which absorbed the time, almost full time, of one lawyer, but when I heard Mr. McLaren tell me, after the smog consent decree, that the division was going to rely on the air pollution section of HEW, now under EPA, for any leads as to whether compliance was being violated, that sort of insured the—in my judgment—insured the inability of the division to self-determine the range of compliance surveillance.

Finally, Carl Kaysen, the noted economist and former consultant to Judge Wyzanski in the *United Shoe Machinery* case, called the Government's relief plan in that case “sketchy, poorly prepared, and”—this is a quote—“failed to come to grips with any of the problems involved. What was needed was a fairly detailed plan, well supported by evidence, not 10 pages of generalizations and citations from legal authorities, supported by 10 minutes of oral presentation.”

And who should be surprised at this, since the Antitrust Division often fails to exert itself as much on the terms of the consent decree as on prosecuting and winning the case in the first instance.

In fact, usually the lawyers and economists who developed the case do not participate in the formulation of the consent decree. It is not then entirely surprising that cases resolved by consent decrees can be Pyrrhic victories, and it is apparent that the reform of the consent decree process is a necessary and legitimate goal.

The Justice Department, however, seems to disagree. Thomas Kauper's previous testimony reflects the historical Department view that the less outside participation—or interference, as they see it—the better. But the reasons offered to justify this view are, in our judgment, unimpressive. Upon closer inspection, they turn out to be hypothetical horrors unconnected to reality, or an even reasonable theory of probability.

Mr. Kauper fears that the bill would disrupt the usual settlement proceedings by requiring “full-blown litigation in virtually every case which the Government brings.”

That brings to mind the old complaint against tort cases, that if you broke new law in the common law under tort liability principles, you would unleash a flood of litigation.

That has never been shown to be the case, and I doubt very much whether this would be the case, as well.

Yet section 2(e), employing the word “may”—not “shall”—does not require “full-blown litigation”; it is explicitly suggestive, not mandatory.

And given the extreme infrequency with which judges have closely scrutinized proffered consent decrees—only once in history has a judge refused to sign a consent decree; on three other occasions, judges have forced modifications making the decree weaker—it is highly unlikely that district court judges will often hold extensive proceedings.

By way of analogy, in bankruptcy cases, the trustees must come forward to tell the court why they think the settlement is adequate, given the original cause of action, and why it is in the interest of the true beneficiary; this is expeditiously done.

Also, all settlements in class actions must be approved by the court, with opportunity for class members to object or opt out; yet this procedure, other than for notice provisions and the final distribution of damages, has not proven overly burdensome or protracted.

I might add, Mr. Chairman, that before the Judiciary Committee, there is a class action bill, trying to overcome the \$10,000 minimum barrier in Federal courts, and the argument consistently against this bill is it will unleash enormous litigation against corporations.

Well, it turns out that this bill would not do much more than what California law does at the present time and, as I am sure you are aware, the class action rights in California have not produced a massive amount of justified litigation.

To the extent they occur, will delays disrupt the filing and implementation of the decree and exhaust the limited resources of the Antitrust Division?

If the Supreme Court imposes a half hour limitation on oral argument, this statute could impose a permissible time period within which a proceeding must be completed.

When our antitrust study, "The Closed Enterprise System," made a proposal similar to S. 782, the authors observed that: "It is possible that these relief proceedings could turn into the very trial that a consent decree seeks to avoid. However, a combination of strict deadlines and various 'preliminary' burdens of proof could prevent any protracted proceedings."

I would add that there are some types of consent decree proposals submitted to the court that deserve a full-blown trial. I mean the idea that a consent decree is never done so poorly and inadequately that it would not deserve that kind of review is, I think, not justified.

And I think there should always be that full-blown type of review held in abeyance for the extraordinary abuse or neglect.

When such proceedings do occur—while they will be limited in number, of course this bill projects that such proceedings will take place—the Justice Department will have to expend some additional Antitrust Division resources.

Yet the bulk of man-hours goes into the preparation of an antitrust case, not its trying; any additional resources expended would be marginal as compared to the work already done.

And if these additional resources did somehow overtax the Antitrust Division's operations, the solution should be obvious: request more resources.

I understand Mr. Kauper commented that this might be inflationary. I know of no better way to reduce privately induced inflation from corporate price-fixing and administered price practices than to beef up the Antitrust Division so it can bring more of these cases.

It is not only consumer protection, but it tends to reduce the corporate-induced inflation, or cheapening of the dollar in return for value received.

Right now, the Antitrust Division has a \$124½ million budget. Now, there are various ways to make this comparison, some of which take

some liberties with proper analogies, but they are insightful as well. It is equivalent to one-fifth that of the Bureau of Commercial Fisheries, one-fifth the cost of one C-5A cargo plane—assuming it flies, and about equal to what Procter & Gamble spent advertising just Crest toothpaste in 1 year.

It is also probably less than what IBM spends on its own legal resources, in-house and outside counsel.

It should not prove impossible to increase the budget of this unit of Government which, when compared to the economy it must monitor—now over a trillion dollars gross national product, a good part of which is the private economy, obviously—takes on the appearance of an ant contemplating a moving mastodon.

Of course, I would not want to compare General Motors with the moving mastodon; it doesn't move at all, it is just a mastodon.

But the Antitrust Division could well allocate half of its resources on General Motors and not finish the proper investigation and enforcement of the law against that giant company.

Senator TUNNEY. Mr. Nader, just as a thought there, do you have any idea what the comparison of resources available to the Antitrust Division, related to the economy as a whole, is now, as contrasted, we'll say, to 40 years ago?

Mr. NADER. Well, I know that in the last 10 years, it has been primarily reflective of wage increases in the Division, which means that in real dollar terms, it has not gone up very much at all, except very, very recently.

Mr. Green has a more detailed perspective on that.

Mr. GREEN. Perhaps a more appropriate measure is manpower, and 20 years ago the Antitrust Division had approximately 300 attorneys and economists; now they have approximately 350 attorneys and economists, during a period in which the real GNP more than doubled and during a period in which the top 200 firms moved from 50 percent of ownership of all assets to two-thirds ownership, so I don't think it has kept up nearly with the increasing acceleration of the economy.

Senator TUNNEY. I couldn't agree with you more. Last year I tried to put an amendment on the floor to increase the Division's wherewithal by \$2 million, as I recall. We wanted to increase it by \$2 million and we ran into a procedural problem on the floor.

I plan to offer such an amendment again and, hopefully, we won't run into the same kind of procedural fix, because it is clear to me that if there ever was a division of the Federal Government that needed beefed-up assets it was the Antitrust Division.

Please go on. I have a vote which I am going to have to leave for in 2 or 3 minutes. Please continue your testimony. Both the majority and minority counsel will be here, as well as my own legislative assistant, and I have had an opportunity to read your statement before you are giving it, so I hope I can get back to ask you some questions.

Mr. NADER. I just want to say that when Professor Turner came on as head of the Antitrust Division, he began to pay more attention than his predecessors to the roles of the Department of Defense in its contracting processes and how it fostered more monopoly, less competition.

Well, the Department of Defense spends \$9 million an hour on the average, 24 hours a day, and you could take that \$12½ million and just put it on Department of Defense, to very good use.

This is a really very important point, because after reading the writings of Professor Turner and other specialists in antitrust law, it is inconceivable to me how they would not conclude that there has to be a massive upgrading in manpower.

Obviously, you cannot jump in 1 year that much, say to \$100 million but a \$100 million Antitrust Division is scarcely, I think, able to give credence to the antitrust law enforcement process. That's the minimum.

And if anything gives credence to Professor Galbraith's commentary that antitrust is a charade, it is not the antitrust laws, as they are written; not the willingness of the Supreme Court and others to render judgment in this area; but it is the great inadequacy of manpower to do the job.

Thus, if delays and resources are problems concerning the Justice Department, the solutions are embarrassingly apparent: impose deadlines and increase resources.

I am skipping over, in the interest of time, to the middle of page 7.

S. 782, in aim and approach, is a valuable reform of the consent decree process. Just to avoid possible judicial rebuke or the airing of incompetence, it should stimulate the Antitrust Division to be far more serious and thoughtful about its consent decrees.

Since consent decree negotiations are more similar to administrative than judicial proceedings, it is appropriate to open up the process so that the interested parties may more readily participate in the formal proceedings.

The bill's provisions will educate both the public and the courts about economic competition and the antitrust process.

An informed public is a *sine qua non* to successful antitrust enforcement—

Senator TUNNEY. You'll forgive me for stepping out. Just continue, please.

Mr. NADER [continuing]. For without it, necessary new laws go unpassed, anti-antitrust laws are passed, Antitrust Division budgets stay low, and enforcement remains unresponsive and uninspired.

I might say, my tripping over the word "antitrust" reflects my dislike for the very term to describe what the Antitrust Division is trying to do. It doesn't have any meaning to the public, except perhaps it indicates to the layman a betrayal of trust.

What it really should be called is the Monopoly Division, or some such name, to really evoke what that division is trying to fight against.

This aspect of public education I don't think has ever been appreciated by the arcane specialists in the legal and economic disciplines relating to antitrust.

If there is not an informed public, there is not the derivative kind of understanding, the kind of climate that goes to making better laws, enforced better, and judged better.

I think there is no better indication of that than the growing public climate dealing with environmental pollution. I think one can speculate with a reasonable degree of support that the courts would never have acted the way they did and the Congress would never have passed the laws if the public didn't get a greater appreciation of pol-

lution being something more than something simply dirty and ugly, but a public health hazard of the first order of magnitude.

I think that the consumer protection dimensions of antitrust law can be brought very much down to the grassroots level in terms of the kinds of purchases of drugs and automobiles and plumbing fixtures and other products and services that are sold at inflated prices because of a series of anticompetitive practices.

An informed judiciary is also necessary to improve the consent decree process. The historic judicial role in this process, observed Prof. John Flynn, can at best "be analogized to the performance of a symbolic religious rite by a high priest or, at worst, as the performance of an important public function with the machine-like logic of a Chiclet dispenser."

True, occasionally a judge may balk at a decree's contents, but as we have indicated, this exceedingly rare. Also, it is true that some judges will *sua sponte* conduct extensive proceedings before approving a consent decree, as Judge Rosenberg did in *United States versus Ling-Temco-Vought*.

But, again, this is far more the exception than the norm. Usually, judges expeditiously defer to the Department's recommendations, and have made it clear that only in extraordinary circumstances would they consider repudiating the proposed decree.

Intervention by outside parties is discouraged by courts; in fact, the very process discourages intervenors since they cannot incisively petition judges without knowing the basis of and discussions behind the proposed consent judgment.

Thus, this legislation can resuscitate judicial review by providing it with the requisite information and by prodding it to more independently scrutinize Justice Department settlements.

I think the trend in judicial review of regulatory agency activity, where the judges are expressing greater skepticism, more incisive questioning, has been a very healthy development, and I think it should be extended in some degree in the antitrust consent decree procedure.

While we support the purpose of S. 782, there are a number of suggestions which we think could improve it. I might add, apropos of my last statement, that the courts in the past haven't done so—that is, scrutinize carefully the Justice Department settlements—does not mean that they can't or they won't do so.

A questionnaire sent out under my auspices to all Federal district court judges asked the following:

Judges rarely reject proffered consent decrees. Do you think it possible for judges to exercise a more independent role toward acceptance of consent decrees?

Of the 10.4 percent responding, 85.7 percent said yes and 14.3 percent said no. When asked further, "Do you think it desirable?", 77.8 percent said yes and 22.2 percent said no.

Admittedly, it would have been nice to have had a greater sample but, in the absence of an alternative zero of information, perhaps this response is helpful.

Returning to my former comment: While we support the purpose of S. 782, there are a number of suggestions which we think could improve it.

First, one could read the first two requirements of the public impact statement—that's section 2(b) (1) and (2)—“The nature and purpose of the proceeding: a description of the practices or events giving rise to the alleged violation of the antitrust laws”—as being satisfied by excerpts from the Government's complaint. To avoid the legislation from being a nullity—and we should remember that if the act passes it will be dealing with a dissenting and reluctant Justice Department—the following language, or something of similar intent and specificity, could replace (b) (2) :

A statement of facts describing practices or events giving rise to the alleged violation of the antitrust laws, rendered with sufficient specificity and describing material evidence and testimony which, together with a reasoned legal analysis of the application of the law to those facts, would withstand defendant's motion for a directed verdict of acquittal if the Government's complaint proceeded to trial.

The second point: The bill empowers the court to “authorize full or limited participation by interested persons, including intervention as a party pursuant to rule 24.”

It is not clear whether this is merely a restatement of decisional law, which is very restrictive toward intervenors, or whether it overrules these decisions and expands the scope of rule 24.

If Congress does intend to amend rule 24, it should do so more explicitly than contained in S. 782.

To insure that S. 782 succeeds in its purpose of increasing public participation in the consent decree process, two additions to this proposal have merit.

First, Harold Kohn has suggested that the bill's “permissive intervention” be replaced by something closer to intervention by right. He would accomplish this by permitting intervention once a group can show that a judgment will have a “not insubstantial” impact on them.

Such a group should also have standing later to argue that the decree is not being complied with.

Second, S. 1088 says that a court, “shall order that a hearing be held unless there is no substantial controversy concerning the proposed consent judgment.”

This language would make it more likely than the language of S. 782 that some kind of public hearing would, in fact, be held.

S. 1088 says a hearing will be held “unless”; S. 782 says a hearing may be held “if.” On its face, this may seem a slight difference in emphasis, but since we are dealing here with district court judges who have shown great reluctance to inquire into proposed consent decrees, S. 1088's more stringent language may be necessary to convince judges actually to hold hearings.

Section 2(f) is a precedential breakthrough in letting the public understand how its Government works. It does not inspire confidence to fortuitously find out months after the event that ITT, by meeting privately and frequently with the Attorney General, Secretary of Commerce, Secretary of Treasury, Vice President, scores of Senators and Congressmen, and who yet knows who else, successfully exhausted the Government into a favorable consent settlement.

But subsection (f) could be improved. “Counsel of record,” presently exempted from its coverage in entirety, should disclose their contacts with at least officials other than those in the Antitrust Depart-

ment; such contacts would be sufficiently unusual and outside an attorney's normal and private work procedure to warrant as much publication as the defendant's lobbyings.

If they lobby a public official, it should be made public. Now, I want to comment here that the Missouri Public Utilities Commission exactly 12 months ago, issued a regulation requiring all formal and informal contacts with any regulatees or their representatives by the employees of the Missouri Public Utilities Commission be filed for public review in the State capitol.

About the same time, Governor Sargent of Massachusetts issued an executive order generally in the same direction with many regulatory agencies, in terms of their contacts or the regulatees' contacts with them being reported, so that they can be scrutinized.

So I think if these trends are beginning at the State level, which is usually considered not in the vanguard of administrative due process and fairness, compared to the Federal level, we might want to give pause to the further lagging of the reform of the enormous camouflage that now surrounds ex parte meetings in hotel rooms and at various social gatherings and in Government offices, between these officials and the prospective or actual defendants.

Consequently, there should be some provision requiring the court to make this public, perhaps by making it a permanent part of the consent decree or by filing at a particular place at the Justice Department.

In addition, the Government should disclose its own records as a reference to insure against any incomplete and self-serving nonreporting by business.

Since the officials involved would be likely to maintain written records of such contacts, formally logging them for the purposes of this legislation should not prove additionally burdensome.

It might also be an extraordinarily helpful record for their future memoirs or appearances before congressional investigating committees.

Turning to the middle of page 11, in the interest of time: Comments received within the proposed 60-day time period should be made public by the Government and should be answered by the Government.

As part of every consent decree, the defendant should be obligated to assume all costs of guaranteeing that the decree is being complied with.

This relatively minor expanse for a business firm will not discourage settlements; it will place the expense of continued compliance where it belongs and may encourage the kind of compliance mechanism which traditionally has been absent in the Antitrust Division.

I indicated this would have been a good idea in the smog case consent decree, to Mr. McLaren, particularly since there is no provision for and, indeed, no indication that there is going to be any manpower applied to the constant surveillance of the possible future collusive activity dealing with smog control systems by the domestic auto industry.

And I recollect that he thought this was an interesting suggestion, at which point I said, "Well, wouldn't it have been nice if there was an opportunity to make that before the Division was locked into a

consent decree with the auto company?" People have different ideas and new ideas and there should be an encouragement of these suggestions before the two parties—the Government and the defendants—are locked in—lock themselves into an agreement.

I think in the last 4 years there is a great deal of circumstantial evidence that the auto companies have continued their agreement not to compete over exhaust control systems; they continue a united front type of posture before the EPA.

With all the alternatives for control of pollution exhaust systems available, some of them used by Japanese and German auto companies, our giant auto industry in this country came up with exactly the same types of technology pronounced by the National Academy of Science as "the most disadvantageous in terms of their cost—their cost, maintenance and durability."

I think with a tougher consent decree, indeed, if there was a trial, things might have turned out differently for the air that millions of people have to breathe and will have to breathe in the future.

Judgments are usually obtained and filed away. Occasionally they may be reviewed or occasionally some attempt may be made to encourage compliance. As I indicated, the smog decree depended on a generally uninterested Environmental Protection Agency to uncover any violations of its terms.

The EPA has got its hands full without being able to connect up technical information with possible antitrust violations, and I must say that it is just not a tradition in the Federal Government of agencies going to the Antitrust Division to further their own regulatory purposes.

If improved and passed, S. 782 could focus a little sunshine on a formerly private preserve of business and Government.

In doing so, the Justice Department is concerned that the ease and frequency with which it obtains consent decrees may be impeded.

According to Baddia Rashid, the Antitrust Division's director of operations, "Since our consent decree program is a most useful part of our enforcement activities, it would be unfortunate if this proposal for expanded public statements were to result in a substantial curtailment of the consent decree process."

To the extent that a defendant—or the Department—refused to settle a case because it could not withstand public scrutiny, we should endorse this bill, not condemn it.

Settlements before trial, no-contest pleas, consent decrees filed simultaneously with complaints, business review letters which secretly give advisory opinions to inquiring firms, voluntary requests for information rather than subpoenas or CID's, as they are called—the entire antitrust process tilts toward secrecy and deference to defendants.

"Ventilating" consent decrees is a start toward more accountable and vigorous enforcement.

At this point, I would like to submit for the record a letter which I wrote to Chairman Eastland on August 12, 1970, with comments on the proposed amendments to the Antitrust Expediting Act.

One more point, if you will: A lot of the statements against this bill are predicated on a prediction of future response, should this bill be enacted, and perhaps it would be a test of the willingness to experi-

ment by those who oppose this bill to ask them whether they would be willing to have this bill be enacted with a 4-year cut-off period, just to see how it works.

And I think perhaps that might further refine the nature of the opposition to this bill, whether it is truly what is being explained in the testimony or whether it perhaps has deeper roots in terms of a much more profound philosophic objection to having the public participate in antitrust enforcement, than simply the kinds of objections that go to full-blown litigation and time delays and the like.

Thank you.

Now, Mr. Green will comment briefly on the penalty section, which we think is nothing more than more of the same, only making up for inflation in the growth of corporations, as it is now in the bill.

Mr. GREEN. Also in the interest of time, I will be summarizing and skipping over my statement.

It is difficult to think of another area of law enforcement where there is so much crime without punishment; yet antitrust criminality—or “crime in the suites,” as some of us call it—is treated with a solicitude usually only accorded White House aides.

This is true despite the massive amount of theft involved, which is documentable, despite the fact that many business firms can be statistically categorized as recidivists or “habitual criminals,” and despite the prevalence of antitrust crime.

Now, on this point of prevalence, there is not much data. We have tried to develop some. A survey we conducted asked the presidents of Fortune’s top 1,000 firms whether they agreed with the contention of a GE executive in 1961—no doubt then bitter over his recent criminal conviction—that “many price-fix.” Of the 110 responding, 60 percent agreed with that statement.

Nevertheless, in the 83-year history of the antitrust laws, there have been only four occasions when businessmen have gone to jail. As one judge said when confronted with a convicted white collar offender, “I could never send Mr. Kurtz to jail.”

Maximum Sherman Act fines of \$50,000 are fictional because, in fact, a much reduced fine is, on the average, assessed. As a percentage of all cases filed, criminal antitrust prosecutions show a sharply declining trend in the last three decades. And “no contest” pleas, which like consent decrees on the civil side settle some 80 percent of all indictments, lead to reduced sentences, far lesser publicity and the defendant’s claim that a mere technical violation of the law has been settled. Finally, the sanction of treble damages is also mythical, as hardly any civil cases end up being trebled, especially since some of the electrical cases were.

In sum then, the network of sanctions that aims to deter antitrust criminality does not outweigh possible benefits to the violator. Based on six case studies, aggregating all the damages involved once a firm was convicted, a study concluded that, “Indictment by a Federal grand jury, punishment inflicted through criminal action, payment of trebled damages resulting from civil trials, all legal costs incurred in the process, none of these nor any combination of them succeeds today in denying the price fixer a profit realization at least double a normal level.”

Corporate crime pays.

Now, it is perhaps superfluous to belabor the extent, cost, and non-punishment of antitrust crime. This is perhaps the popularity of the provision of S. 782 which would change the maximum time from \$50,000 per count to "\$500,000, if a corporation, or, if any other person, \$100,000."

This proposal has won wide bipartisan support, the approval of the Justice Department, the American Bar Association, and many businessmen and judges.

We strongly oppose it. If passed, it would not substantially increase the sanction for antitrust crime, but would stymie all other reforms in this area for yet another generation—as did its ancestor in 1955.

That bill increased penalties from \$5,000 to \$50,000. The \$500,000 and \$100,000 fines, maximum fines again, are still insignificant when compared to the bill involved or when compared to other penalties, even white collar penalties. Two months ago, Ford was fined \$7 million for violating the clean air amendments. And the \$500,000 and \$100,000 fines are maximum; given judicial timidity toward imposing maximum fines in the past, it is extremely unlikely they would be commonly assessed. Just as the \$50,000 maximum led to a \$13,000 average fine, a \$500,000 maximum might result in, say, \$100,000 average fine. This at the same time can either be inconsequential to a giant firm—Fortune's 500 averaged a \$47 million net profit—or, on the other hand, it can bankrupt the small local firm.

An absolute fine of this level is a clumsy way toward a good goal; based on its predecessors, it repeats the old saw that nothing succeeds like failure.

Therefore, we propose some recommendations which we think will improve the bite of antitrust penalties.

First, and especially, a percentage fine is superior to an absolute fine. Then the penalty would fit the crime.

For the period of the illegality, there should be a mandatory fine of at least 10 percent of the profits of the price-fixed product. If a firm made—again, hypothetically speaking—\$10 million on a product, \$2 million of which is due to a successful conspiracy, a \$1 million fine does not seem excessive. On the other hand, for a firm which had a \$10,000 profit on a product, \$2,000 of which is the result of a crime, a \$1,000 fine seems more appropriate. With these fines, these variable financial fines, the profit motive itself should help self-regulate the system into compliance.

Second, the maximum possible jail sentence should increase at least 1 day. This admittedly symbolic move—now they can be incarcerated for up to 1 year—would make antitrust crime a felony, as it deserves to be, not merely a misdemeanor as it presently is. Even so knowledgeable an observer as Nicholas Katzenbach said, in a discussion of antitrust illegality while Attorney General, "Antitrust fraud is, after all, only a misdemeanor." Such benign neglect must be purged for price-fixing to be treated with the disrespect it is due.

Third, given the historic unwillingness of judges to sentence and incarcerate white collar offenders, there should be a mandatory minimum jail sentence of 4 months.

Antitrust crime is premeditated and planned by sophisticated and knowledgeable people for illegal profit; these are precisely the sort of

culprits who can be successfully deterred by a threat of imprisonment. As a consequence, antitrust crime should dwindle, and articulate advocates for prison reform should increase.

Finally, skipping over some intermediate suggestions: As a substitute measure to these already proposed, antitrust crime could be brought within the purview of the proposed revisions of the Federal Criminal Code, now pending as S. 1.

It could be made a class C felony, thereby invoking related sections of the code, involving probation, parole, imprisonment, fines, et cetera. This would treat antitrust crime as the proposed code would treat securities violations, which I think are an analogous business violation, and it would deal only with per se offenses, lest any potential defendants or businesses complain that they would be criminally penalized for acts that they didn't know were criminal.

In conclusion, I think surely the \$500,000-\$100,000 proposal does not exhaust the ingenuity of this panel to cope with the problem of antitrust crime. Before repeating past failures by trotting out this well-worn and well-meaning reform, serious consideration should be given to new sanctions which would do something brand new: seriously deter antitrust crime.

"The antitrust law sanctions are little better than absurd when applied to huge corporations engaged in great enterprise." This was true when written in 1944 by Justice Robert Jackson. It was true when quoted by Senator Hart at the 1970 hearings. It is true today. We hope it won't be true at hearings in 1983 when you may perhaps consider a proposal to increase the maximum fine from \$500,000 to \$750,000.

Thank you.

Mr. BANGERT. Senator Tunney had some questions to propound, and if it is agreeable, in the interest of time, Mr. Levine can go ahead and propound those questions for Senator Tunney.

Mr. LEVINE. Thank you, Mr. Bangert.

In Senator Tunney's absence, I would again like to thank you both very much for appearing, and apologize for the necessity of his being away with virtually no notice.

We find ourselves, at this subcommittee session, in an interesting position of hearing from several witnesses, all of whom favor some parts of S. 782 but from very different perspectives.

Before getting into some of the questions that both of you gentlemen raised, I would like to refer briefly to a letter submitted to Senator Tunney last week by Professor Turner, dated March 28, and which I assume will be the foundation for his testimony after you are off the stand.

I would like to ask for comments specifically with regard to some of the suggestions that Professor Turner had made, with regard to this legislation.

The thrust of Professor Turner's suggestions are contained in the paragraph on the first page, numbered paragraph 1, which I believe you have in front of you, in which Professor Turner wrote as follows:

Almost invariably, the possibility that inadequate consideration or undue influence may have occurred and the need or desirability of a public explanation of the reasons for the decision will arise in cases where the proposed consent judgment departs in major respects from the relief requested in the complaint or the relief which would be normally appropriate for the antitrust violations alleged.

Where the relief approximates what has been requested or what is normally obtained after an adjudication of violations, it is, of course, conceivable that the Department was not sufficiently attentive to the needs of the case or was subjected to undue influence.

But it is vastly more likely that any minor claimed deficiencies will simply reflect the fact that the Department could not obtain the defendant's consent to the maximum relief that would be obtainable after a full and successful trial.

In any event, so long as the relief is equal or close to what is normally obtained, there is little or no public interest at stake in any prolonged inquiry.

As a result of this premise, Professor Turner suggests that the provisions of S. 782, with certain modifications, be triggered so that they apply only in cases in which the proposed consent judgment does depart in major respects from the relief requested.

I would be interested in what both of you gentlemen feel as to the advisability of such a triggering mechanism in S. 782.

Mr. GREEN. There is a substantial problem with that.

Unlike when Professor Turner headed the Antitrust Division, the present administration frequently files a consent decree simultaneous with the filing of the complaint.

Therefore, it is difficult to compare what they could have gotten, because very often it is identical—perhaps because the consent judgment, which was negotiated prior to the filing of the complaint, did meet the needs of the Antitrust Division. But it is possible that a complaint can be tailored to the decree, so that there is no departure, no difference between the two.

Second, there is a benefit, I think, even if the ultimate consent decree is identical to what is sought in the complaint. There is a benefit to the measures proposed in 782 because of something that Judge Wright eloquently argued. When you know that you are going to be scrutinized later, perhaps in public, it gives you perhaps an additional incentive and encouragement to be more scrutinizing in your private assessment, within the confines of the Justice Department, when formulating a consent decree. You may be tougher. You may put it down on paper in a way that you would not be required to if the triggering mechanism that Professor Turner proposes were passed.

I understand. I think, the basis of it and the concern, as has been expressed by Mr. Kauper, that of avoiding prolonged inquiries.

On that wording, "prolonged inquiry," of Professor Turner and "full-blown hearings" of Mr. Kauper—I think, as our testimony indicated, that can be avoided by very carefully laying out deadlines, preliminary burdens of proof, so that the hearings simply could not prolong the proceeding.

Again, this was not orally communicated, but it was in our testimony—the average antitrust case takes 3½ years. The average merger case, from merger to completion, takes 5 years. The average monopolization case, from its incident to its solution, takes 8 years.

So I do not think that a week or even a month hearing, if that be the period designated, would unduly prolong or burden the antitrust process.

Mr. NADER. There are also two other elements involved.

It is quite conceivable that between the arriving at a meeting of the minds in a consent decree by the Government and the defendant and its approval, there is subsequent information that comes up.

It is also possible that, between the filing of the original complaint and the proposed consent decree, subsequent information is made available.

There is also the point that not everybody has a monopoly of ideas, and oftentimes the people in the Antitrust Division may not be as close to the industry as some of the internal industry critics may be, and they may be able to suggest very detailed types of relief that will insure, if not the expansion of the consent decree's provisions, at least better surveillance for compliance.

Mr. LEVINE. As I understood the reasons for the suggestion offered by Professor Turner—and I am certain that we will hear the reasons firsthand in a few moments—another one of them was that in a variety of consent decree—proposed consent decree cases—the case just isn't of sufficient public importance to merit the potential delay burden costs and whatnot that the Antitrust Division may find imposed upon it by these provisions.

Judge Loevinger, who testified at the last hearings, for reasons similar to this, also proposed the so-called trigger mechanism. His trigger mechanism was different from Professor Turner's. His trigger mechanism would have employed certain—would have employed the trigger that we have proposed in the Expediting Act revisions, that if a case is a general public importance, then the consent decree reform provisions of S. 782 would apply.

I wonder whether any trigger mechanism, whether it's Judge Loevinger's, whether it's Professor Turner's, or another trigger, which would somehow or other define the concept of a so-called important antitrust consent decree, would be advisable in light of the argument that we have heard from witnesses at these hearings, that these proposals may be burdensome and costly, and delay antitrust enforcement procedures.

Mr. NADER. Well, in terms of one criterion being advanced by these critics of the bill, that the difference between the complaint filed and the proposed consent decree be considered. And that if there is a great difference, if the proposed consent decree, say, is much, much shrunken from the filed complaint, that that be a trigger mechanism.

One has to consider whether that prospect would not inhibit the range of the original complaint that is filed in the first place. There are enough inhibitions on the scope of complaints in a normal anticipation of judicial precedent and other factors without adding another one. There is also the matter of compliance mechanisms, not envisioned by the complaint, which should be in the decree.

Mr. LEVINE. Do you think that the procedures such as those in the consent decree section of S. 782 should apply to all proposed consent decrees?

Mr. NADER. Yes. I certainly would be interested in seeing some interesting standards that say these cases are to be considered of greater public importance than other cases, but in the absence of those specific standards, I think it is simply safer to have a more comprehensive umbrella.

Mr. GREEN. One other point: Such standards would, of course, give some discretion to the Department when not to hold a hearing. This congressional hearing originated because of a discretionary judgment

in the Justice Department, which many people doubted on its anti-trust merits, and were skeptical of on its political ground.

God knows, the Attorney General and his antitrust chief have enough discretion under an intentionally vague act, the antitrust laws, to file a case or not file it, whatever the merits; and we are not attacking, nor is this bill attempting to attack, that kind of prosecutorial discretion.

To lump another discretionary layer at the consent decree process doubles the discretion. And I would be wary of it. I would have to see the language of it, if not the standards articulated under it.

Mr. NADER. As we know, often it might be a very small consent decree relating to a patent monopoly that illuminates a much broader spectrum of abuse in a particular industry. I think it takes a very high degree of competence to set those kinds of criteria when the basis for those kinds of criteria is entirely speculative. That is, there is no experience in the past; it's purely projective.

Mr. LEVINE. It isn't often that we have the luxury of two contrary points of view in the same room on issues of this specificity, and I appreciate your indulgence in commenting on specific suggestions of Professor Turner's.

We will be asking Professor Turner to comment on specific suggestions of yours when he is on the stand. I know that Senator Tunney wanted to do that, if he were here, and in his absence I will, if he doesn't have the opportunity to return.

I would like to ask you both about two additional paragraphs in the letter that Professor Turner sent to Senator Tunney.

Do you have that full letter in front of you?

Mr. NADER. Yes.

Mr. LEVINE. March 28 letter?

Mr. NADER. Professor Turner's letter, yes.

Mr. LEVINE. Yes. Paragraph 2—numbered paragraph 2 on page 2 reads as follows:

As Mr. Campbell's prepared statement seems to suggest, it seems quite clear to me that the Federal district courts presently have ample powers to conduct whatever inquiry is necessary to determine whether or not a proposed consent judgment is in the public interest.

Accordingly, I do not believe there is any need for new legislative specification of procedures and powers, and I remain deeply concerned that the proposed revisions—principally by encouraging third-party intervention but in other respects as well—would impose unnecessary burdens and may even be damaging to the effectiveness of consent decrees.

I would appreciate your comments on that paragraph.

Mr. NADER. Well, before Mr. Green comments on that, I would like to note that if some of the former Assistant Attorneys General would care to comment on their opinion of consent decrees, which were approved by Federal courts prior to their ascension to the posts, we might be greatly illuminated as to the ineffectiveness, indeed the charade of a number of these consent decrees involving very large companies or very large matters.

I specifically refer to the kind of political background, as well as the content, of the Western Electric-A.T. & T. consent decree, 1956, and perhaps if there was some sort of process such as is suggested by this legislation, that consent decree would have had a chance to be effective in its incipency.

Now, it's one thing, perhaps, for Professor Turner to say, "Well, in his tenure there wasn't the kind of political maneuvering that occurred prior to the A. T. & T.-Western Electric decree," but certainly the last few years have not generated confidence in an extension of what Professor Turner believed was the case in his tenure, particularly with such matters as the I.T. & T., the Warner-Lambert drug merger, Granite City steel, and others, where the professional judgment of antitrust staff right up to the top was ineffective, intimidated or inhibited in a permissive direction.

I really think that perhaps one of the important points to bring out in paragraph 2 of Professor Turner's letter is his judgment of the effectiveness, say, of consent decrees in the 1930's, 1940's, 1950's, up to 1964; if we don't have the future as a predictable certainty in terms of how this act is going to work, we might want to revert to the past as a basis for developing the urgency for the act.

Mr. GREEN. Professor Turner's statement is that Federal district courts presently have ample powers to conduct necessary inquiries. I think that is true. Statistically, however, they have extremely underutilized this power.

It is my understanding that in the decade of 1960, of eight attempted interventions in district courts, seven were denied, and the only one which was granted was in the *El Paso* case, because the Supreme Court directed it so.

More recently, as Judge Wright indicated, an increasing number of judges have been holding hearings. For example, in the *LTV* case, which involved a mammoth amount of assets in employees, and the judge considered it necessary; but it's still a great infrequency, and one can understand why. When a district court judge is confronted with the Government and a corporate defendant saying "Your Honor, this is satisfactory to both of us," and it is on a very complicated issue, which would require a tremendous expense of judicial resources to investigate, there is a natural disinclination to hold a hearing.

Again commenting on a survey we sent to judges, we asked them—this is all district court judges in the United States, and approximately 10 percent replied—how many antitrust cases you handled in the last 2 years. Two-thirds had handled none. For many of these judges, this is a first experience, and they are not familiar with what is good procedure, or even bad procedure.

Second, we asked, perhaps leadingly, "Given the complexity and size of some antitrust cases, do you ever find yourself ill equipped to deal with a large antitrust case?" Forty-three percent said "Yes;" 57 percent said "No." So I think a lot of them lack the background and familiarity with it, and whatever may be theoretically possible has simply gone unexercised, and it would be well for this panel to encourage more hearings, since they haven't empirically existed before.

Mr. LEVINE. Mr. Green, let me ask you this with regard to the results that you just set forth: Would it be more constructive to set forth such as S. 782 currently does, a set of optional procedures that can be followed such as those set forth in subsection 2(e), or simply to require that the court determine independently that the proposed consent decree is in the public interest such as subsection 2(d) requires, but leave the procedures by which that determination would be made solely to the discretion of the court?

Mr. GREEN. Well, there are two ways to leave that discretion to the court. S. 782 takes one way, and as our statement indicated, S. 1088 takes another way. It does ultimately lead to the discretion of a court, and that doesn't offend me. But, as I said, there are different ways to do it, and S. 1088 has more affirmative language. It is: You will hold it, unless. And that makes the court think through whether there is a substantial question whether the consent decree is adequate.

The language of S. 782, being far more permissive, may let judges continue to do what they have always done, which is, however much the Justice Department wants to deny the metaphor, to "rubberstamp decrees," rather than independently investigate them.

Mr. LEVINE. And as I understand your testimony, S. 782 is, if anything, too permissive, and you would prefer to see language which is at least as compulsory and perhaps more?

Mr. GREEN. That is correct.

Mr. NADER. The problem is also that in actual fact, when the Government and the defendant come proposing—agree to the resolution of the case, and it's proposed to the Federal district court, it is still, in form, supposedly an adversarial proceeding, but there is only one advocate, the combined agreement of the Government and the defendant.

Not only isn't there an advocate on the other side, intervention is very difficult, but also the judge is not given, for example, any possible dissent, any countering arguments that might have been brought forth within the Antitrust Division. The consent decree is hardly substantiated in terms of its own language, rather brief. It doesn't give the pros and cons the way, say, judicial opinion would before coming to a conclusion. And the judge is, perhaps, several hundred or a thousand miles away from Washington. He has no staff. He has got a couple clerks. In that kind of context it seems to me absurd to think that the judge is going to make an adequate inquiry as an independent judicial figure should.

I don't think he is operating, or she is operating in an adequate legal environment to encourage that.

Mr. LEVINE. Let me move to numbered paragraph 4 of Professor Turner's letter, at the bottom of page 2, in which he states, "I agree with Mr. Kauper's and Mr. Hammond's suggestion that proposed subsection (f)"—which is the disclosure of lobbying subsection—"be modified to exclude from its scope communications with any official or employee of the Department of Justice."

I would appreciate your thoughts on that suggestion, as well.

Mr. NADER. Well, for example, I don't think that the—let's say, a stronger case can be made for not excluding from its scope such communications, perhaps the strongest case that can be made, certainly not excluding communications with the officials outside of the Antitrust Division, but still in the Justice Department.

I mean, when Attorney General Ramsey Clark was asked to meet with a whole array of auto officials and their lawyers on the smog case, those were rather important meetings, and I believe the Antitrust Division chief was there. And I think it is important for the public to know that.

I think, since the Attorney General is inescapably a political figure, whatever may be said about the Antitrust chief, that amounts to an argument, I think, quite compelling, that this information be logged and made public.

Mr. GREEN. When a defendant in an antitrust case or his counsel petition the Antitrust staff, or the head of the Antitrust Division, that is normal and unextraordinary. When they petition or perhaps lobby—if it's true, and I agree, that the Attorney General is more of a political figure—the Attorney General, that is more extraordinary and rare.

Therefore, I think the latter should be logged and made publicly available information, although it doesn't necessarily mean that we would urge the logging of contacts in the Antitrust Division, but "Yes" in the Attorney General's Office.

Mr. NADER. There are interesting patterns that can be developed, however, even within the Antitrust Division. Let's assume, for example, that a major Washington law firm's senior partner has had a long friendship with the Antitrust chief. It is important to determine whether that friendship has, in effect, led to direct telephone calls and meetings between the lawyer and the Antitrust chief instead of going through more routine channels with section chiefs as, say, other partners in other Washington lawfirms might have to, if they didn't know, personally, the Antitrust chief.

So there are interesting patterns that could be developed for public appraisal with the logging of such contacts.

Mr. LEVINE. Do you think that it is possible that logging conversations such as this might inhibit settlement discussions?

Mr. GREEN. Only to the extent, I think, that they are illegitimate. If you call and say, "We have a proposal and we would like to meet with you." and that is logged, the fact that they are coming in to meet with you, that is normal and and that is what the process wants to encourage.

But if this happened in the ITT case, where an ITT official at a party discusses the case with the Attorney General of the United States—if that is discouraged, that is what we want to discourage.

We don't want to discourage legitimate consent decrees, but the extent to which they are reduced in number may reflect the fact that they are illegitimate to start with.

Mr. NADER. If I may provide a personal experience that I think is interesting on that point: When I was a member of the Motor Vehicle Advisory Council, Department of Transportation, at the first meeting, I suggested, before all the other members, that the meetings be held in public, and that the press be invited, and anybody who wants to attend can come.

The representative of Firestone said that would be inadvisable because it would inhibit communication and candid opinions by the members of the Advisory Committee, at which point I asked him whether, indeed, he would say anything before me, that he would be inhibited in saying if it was made public to people who wanted to come in and attend the meeting.

And obviously he wouldn't. I don't want to draw that as a compelling analogy on all fours, but, basically, many things which should be inhibited because they are improper or they are implied in the sense of external influences and upper level contacts, would be inhibited if there was a more open logging of these kinds of contacts.

I think the next 10 years are going to show at the State and Federal administrative level an unrelenting pressure for more and more openness in terms of these kinds of contacts.

Mr. LEVINE. I wonder if it makes any sense to log all of the contacts with the court, allowing the judge the discretion to determine whether or not certain of the contacts will be released. For example, contacts between counsel of record or contacts between members of the Justice Department, or contacts that for other reasons, the Division feels may not need to be exposed to public scrutiny, but which should be provided if there is an indication or pressure, and that the judge should make that determination.

Or do you feel that all these contacts should be logged in public in the first instance?

Mr. GREEN. I don't think that is a judicial determination. What we are talking about is democratic access, which is a political judgment for you, for Congress to make, and I would favor it because I would want to know who has access and how frequently to public officials; and they will know how often I visit public officials, also.

It's not a relevant decision for a judge to make in the context of deciding on the merits of a legal issue. Also, we are talking now very specifically about counsel of record and the Justice Department, or the Attorney General. But we are flatly very favorably disposed toward the logging of contacts with other agencies in Government, and there seems no justification when you visit John Connally, Secretary of the Treasury on an antitrust case, and the resulting memos show that the purpose was straight political pressure, that that shouldn't be made public.

Mr. NADER. It shouldn't only be implied that political pressure would be minimized with this kind of logging. It is also a matter of sensitivity that tends to be diminished by Government officials who continually spend so much of their time just hearing one point of view.

For instance, if the Department of Defense's operations in chemical warfare in Vietnam were more open to scrutiny at an earlier time than they were disclosed, I think there would have been some people in the Department of Defense, who reacting to the public response to this, might have become more sensitive, as indeed they did later on, after the Scientific Report of Harvard Professor Messelson was released.

It's just not only a matter of political pressure: it's also, I think, exposing the Government official to the kinds of ideas and the kinds of values that might provoke a reassertion of part of the official's intellect and conscience that has been subjected to atrophy because of that one-sided exposure.

Mr. LEVINE. S. 782, as now drafted, includes criminal as well as civil cases. And since consent decrees are not entered in criminal cases, the provisions of S. 782 don't really apply as readily to those as they do to civil cases.

But I am wondering if it wouldn't be a good idea to draft another bill which sets up some similar requirements before nolo pleas are accepted in criminal cases.

Presently the acceptance of a nolo plea is discretionary with the judge, and the requirements that I am thinking about are, for example, that the judge make a finding that a plea of nolo is in the public interest before the plea is accepted, and that the public be advised that a nolo plea is offered, and their comment considered.

I am wondering what your reactions are to those thoughts.

Mr. GREEN. I think, at a minimum, I would support that because there is a direct analogy between consent decrees and nolo decrees in that neither provides prima facie evidence to later potential treble damage litigants.

Each permit the corporation to say, as they frequently say—this is not a hypothetical—that, “Well, we settled the technical problems, and there wasn’t anything seriously at stake.”

I would go further, if not to abolish a nolo plea, to insist, as Senator Hart’s 2512 did 6 years ago, that prima facie liabilities do attach to a nolo plea.

To those who would—as has been argued in the consent decree process—fear that you would lose nolo pleas, I would only point to the fact that when judges refused the offer of nolo pleas 25 times in the 1960’s, when the Department urged that they refuse it, between 15 and 20 of those times the defendant then pleaded guilty. They did not insist on a full trial.

So that, if you insisted on a prima facie, either in the consent decree process or the nolo process, I still think you wouldn’t have many trials, because the facts of the matter are often so clear that a defendant knows that a trial would simply be worthless.

Mr. NADER. Not only that, I think corporations are more wary of the amount of material they reveal on the public record at trial.

Many of the systematic scholarly criticisms of corporate behavior—for example, there is one done by Professor Mueller on the *Cellophane* case, which was almost based entirely on court records.

One of the great—perhaps the greatest failure of the Antitrust Division over the years is its lack of zeal in taking these matters to trial and providing the kind of public documentation that I think the public deserves, as well as those who are more directly offended or affected by the violation.

That is a very important factor in the corporation’s calculations, as to whether to take a hard line on this matter or not.

Mr. LEVINE. I would like to move briefly to Mr. Green’s testimony on penalties, and just ask you one question. That is whether or not you feel that a minimum penalty, a minimum fine—you did talk in terms of a minimum jail sentence—but do you feel that a minimum fine might be an acceptable or constructive amendment to this type of legislation?

Mr. GREEN. Parenthetically, my orally delivered testimony was the testimony of both myself and Mr. Nader.

As argued, I think only a minimum fine or incarceration is adequate to deter an action which is so profitable for its perpetrators. We are here dealing not with a crime of passion, which perhaps cannot be deterred by penalties, no matter how great, but a crime of obvious premeditation. And as noted, serious penalties can successfully deter—deterrence being one of the major goals of the criminal process—just such activities.

Again, an absolute fine—which is a myth, because it is not imposed anyway—is a charade that we are all indulging in. I cannot see its benefit ultimately.

Mr. LEVINE. Your testimony suggests a wide variety of additional questions. In the interest of time, at least at this point, I would like to see if minority counsel has any questions that he would like to ask.

Mr. CHUMBRIS. Thank you. Well, I might as well take you first, Mr. Green, touching on a point that Mel Levine was just talking with you about.

A few years ago before this subcommittee we had two bills simultaneously. One was to increase penalties from \$50,000 to \$500,000, and a bill to amend the law so that, as a result of the treble damage suits, the defendant would only be able to deduct from his taxes one-third, rather than the three-thirds that the defendant would have been given the privilege to do under the ruling of the Internal Revenue Service.

Our subcommittee did not have a chance to act on the deduction of the tax bill, but it was taken care of on the floor by an amendment to a pending bill, and the bill did become law. This means, from the testimony we have received in previous cases—that in one case of a \$40 million settlement, but to make my example simpler, let us say it was a \$45 million settlement as a result of a treble damage suit.

Prior to that law, the entire \$45 million would be deductible. Under the new law, only one third of it could be deducted, and the other \$30 million would be taxable.

Forty-eight percent of \$30 million is \$14,400,000 that the defendant now would have to pay in taxes if it occurred after this new law.

So, in a sense, one of the points that you are raising—a fine of 10 percent of the profits of the price-fixed product has now become a law but in a different sense from what you had in mind. It is a deterrent to the corporations that would be violating the type of law, like price fixing, which would lead to treble damage suits resulting in what you might call a fine of \$14,400,000 for this particular case.

I am only bringing that out to show that something has been developed by Congress which would deter a company.

Mr. NADER. May I just comment on that, Mr. Chumbris?

That philosophy of antitrust enforcement against antitrust crime is quite different from the philosophy underlying the enforcement of street crime laws.

For instance, if a burglar came into a person's house and stole \$3,000 and then was apprehended, the Government would never say, "Well, let's just fine him \$500, because he is going to be sued for a massive amount of civil liability for assault and battery by the homeowner whom he struck."

The Government's position is they get it all back. And I think one of the most outrageous trends in the entire law of antitrust is that you can hardly point to a single instance—even billion and a half dollar price-fixing conspiracies—where the companies came out with anything other than a very substantial profit, even after the maximum enforcement against them, in terms of economic reparations and fines.

The *General Electric-Allis Chalmers-Westinghouse* cases, the tetra-cycline cases, the plumbing fixtures manufacturers cases, all were tremendous price-fixing conspiracies. They were very, very profitable and then, when you add interest over a 10-year period, you almost double your money. And the fines were utterly trivial.

I think that the real deterrence in antitrust law is—if it costs the companies far more when they get caught than they profit, so that, in terms of their own economic motivation, it does not pay, and it does not pay, perhaps, by an order of magnitude of two or three.

MR. GREEN. Mr. Chumbris, if I could just correct one statement you made about that revenue ruling. You are not allowed to deduct two-thirds of the treble damages if the private case followed a successful Government prosecution.

That is not a minor qualification, because, if there are damages successfully obtained and there was not an original Government prosecution, then it is deductible as always. So it is not as absolute as you indicated.

And then factually, that would lead me to ask: In what percentage of successful criminal prosecution are the treble damages finally obtained? I do not know that anyone knows—perhaps the administrative conference could do this better than either of us—but until you can show that that is frequent enough to deter, even the reversal of the 1962 revenue ruling, the compromise reversal, does not in any way show, other than conceptually, that firms are deterred.

Its probable infrequency argues for, I think, the new method that we proposed today.

MR. NADER. I think the case can be made that one would have to strain history to find a treble damage law suit that even equaled the ratio of 1 to 1, before interest is added.

The GE-Allis Chalmers-Westinghouse and the coconspirators, I believe they all ended up paying a total of \$500 million. Anybody that has followed that conspiracy knows that the bill over a period of a decade was far greater than that. If you add interest, it is far greater than that.

MR. CHUMBRIS. This point that we are discussing right now was part of the testimony in the more recent hearing on the increased penalties bill, several years ago; and I am not using it as an argument against the increased penalties bill. The cases that you were referring to all occurred prior to this law.

Only time will tell whether it would be a deterrent to company "X," that figures if they get caught and they will be indicted criminally for price fixing, and as a result of that conviction or plea of guilty, or even if there is a nolo and still a tremendous treble damage results from it and they are going to get stuck with the \$14,400,000 cost. They would not have had to worry about such a cost prior to that time.

That is primarily what you are looking for, whether you increase it from \$50,000 to \$500,000 to deter them, or whether this \$14 million will be a deterrence, that is what was debated in that previous hearing.

I only bring it up because you used the example of a percentage as the basis for this particular type of deterrence.

For you, Mr. Nader, you pointed out on page 11:

If approved and passed, S. 782 could focus a little sunshine on the formerly private preserve of Government and business.

Let's assume that the bill is not improved and is passed as it is, or it is passed with certain amendments that delete certain provisions of the bill, would you still support it?

Mr. GREEN. Are you saying if everything we support in it is deleted, will we support it? No.

If you are saying, if it is not improved at all, I personally would still support the consent decree part of S. 782, but not the criminal penalties or amendments to the Expediting Act.

Mr. CHUMBRIS. There are several witnesses who feel as strongly as you do about some of these. For instance, Victor Kramer asked for some deletions, to take out the criminal aspects altogether. He also said other types of cases would be just a waste of time, just concentrate on certain types of cases.

Suppose, then, the Senators said, "Fine, we will take Victor Kramer's point of view," or, let's say, Donald Turner's. You have already read part of his letter with some of his suggestions.

Now, the City Bar of New York has some suggestions. They were in favor of the bill. And Mr. Blecher from California testified.

Assuming that a bill is reached as a result of the composite testimony and evaluation of that composite testimony, how would you react to the bill, or are you insisting on all or nothing at all?

Mr. GREEN. Of course, we would have to see the composite bill. We cannot speculate on what does not exist.

Mr. CHUMBRIS. That is all. Thank you.

Mr. LEVINE. I have a variety of additional questions, but in the interest of time, I would like to request that we might be able to submit some of those to you in writing, particularly with regard to the proposed modifications of the bill, some of which I think merit very serious consideration.

If you could respond to written questions on that, it would be enormously helpful.

I would like to make one comment, and that is that with regard to Mr. Nader's suggestion of a 4-year cutoff, I think that that is something worth serious consideration. It is an intriguing point, and I will be interested in Professor Turner's comments on that.

But I think this has certainly been a very helpful and constructive suggestion, as has been the rest of your testimony. Again, in Senator Tunney's absence, I want to thank you very, very much for your help.

Mr. NADER. Thank you very much.

Mr. BANGERT. Our next witnesses will be Mr. Bradley M. Thompson, accompanied by Mr. Theodore A. Serrill, representing the National Newspaper Association.

**STATEMENT OF BRADLEY M. THOMPSON, PUBLISHER, DETROIT
LEGAL NEWS, DETROIT, MICH., ACCOMPANIED BY THEODORE A.
SERRILL, EXECUTIVE VICE PRESIDENT OF THE NATIONAL
NEWSPAPER ASSOCIATION**

Mr. THOMPSON. Thank you, gentlemen, for allowing me a part of your time today. And my special thanks to Professor Turner for his courtesies in allowing me to speak first.

My name is Bradley M. Thompson. I am accompanied by Theodore A. Serrill, executive vice president of the National Newspaper Association. I am the publisher of the Detroit Legal News, a newspaper in Detroit, Mich. The circulation of the Legal News is about 3,000, primarily among judges, lawyers, business people, and public officials.

I have been a member of the National Newspaper Association for many years. I am presently a director of the Printing Industries of America, a member of the Legislative Committee of the Michigan Press Association and the Public Notice Committee of NNA.

The National Newspaper Association represents the interests of about 8,500 community newspapers across the United States.

NNA has a limited, but, we believe, significant interest in Senate bill 782, sponsored by Senators John Tunney and Edward Gurney; and Senate bill 1088, sponsored by Senator Birch Bayh. These bills would require publication of the terms of proposed judgments in Governmental civil and criminal antitrust acts, set up a procedure for public comment, and extend the effective date to at least 60 days after filing of the agreement, and make other provisions.

It is not the purpose of this association to support or oppress enactment of this type of legislation, although as a matter of principle, we do endorse any legislation which allows, whenever possible, public participation in the decisionmaking processes of our legislative, executive, and judicial branches of Government. With that in mind, NNA does endorse the concepts involved in the subject legislation.

The interest of NNA is, however, specific; and as stated, it is not our purpose to discuss the pros and cons of the legislation itself, but rather to insure that the public interest is served if such legislation is enacted.

NNA is interested in assuring that should this legislation become law, it will protect the public by guaranteeing opportunities for public awareness of the terms of proposed consent decrees and other matters, as well as opportunities to comment.

S. 1088 already provides for public notices in newspapers. We simply wish to strengthen those requirements and make them more specific. We urge the committee to include newspaper public notices in any bill it recommends.

Our initial suggestion, therefore, is for the committee to include public notice in newspapers in the bill it recommends. Public notice through the Federal Register is not an adequate means of informing the public at large.

The readership of the Federal Register is extremely limited even in the Nation's Capital. We agree with the sponsor of S. 1088 that the notice should be contained at least in newspapers published in Washington, D.C., in the district where the case is pending, as well as such other districts as the court may determine.

If we are faced with a situation that concerns a company or a case in Detroit, notification should be in Detroit or Salt Lake or Los Angeles; wherever the matter is, notice ought to be given in that area.

S. 782 sets forth certain items which the "Public Impact Statement" must contain. We suggest that the final bill should also require that the statement contain in addition: (1) a list of the materials available to the public in a specific case as a result of this legislation; (2) where such material may be inspected; and (3) a specific invitation for the public to comment during a stated period of time.

We note that S. 1088 would require publication of the notice for 7 days over a period of 2 weeks in newspapers of general circulation: (1) in the district in which the case has been filed; (2) in Washington, D.C.; and (3) in such other districts as the court may direct.

We suggest that the number of publications be reduced, but that the period of publication be extended to cover 3 weeks; one publication a week for 3 weeks.

We make this suggestion because of the common occurrence today of vacations, 2- and 3-week vacations. By publishing for at least a 3-week period, that would cover a minimum of 15 days, the sponsors of this legislation can be assured that even persons who are out of a city on vacation or other matters for 2 weeks or more will be sure of an opportunity to read the notice.

I think Judge Wright, when he spoke to you, touched on two points here. One, there are many cases involved in this type of ruling that involve the public. He mentioned specifically the pension fund of—I think it was L.T.B.

He also spoke of cost. Let me set your mind to rest regarding cost. We are talking about a notice or notices which probably might be in the neighborhood of \$25, not more than \$50. If they were very, very long, they might be more than that. I can't conceive of a notice in this matter that would exceed \$100. And when you are talking about the number of people involved, the amount of money involved is nominal.

Mr. LEVINE. Can I interrupt you for one moment? Are you talking about \$100 now per notice, or a total of \$100?

Mr. THOMPSON. I am talking about a total of \$100. In other words, a notice published, as we recommend, three times in an affidavit of publication, it would be rare that it would be a \$100.

Specifically, we recommend that the public notice or, if you wish, the public impact statement provision in the final bill read as follows:

(A) by publishing once per week (on the same day each week) for three successive weeks in one or more newspapers published in the district in which the case has been filed and in Washington, District of Columbia, and in such other districts as the court may direct a notice containing the following:

- (1) the nature and purpose of the proceeding;
- (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
- (3) an explanation of the proposed judgment, the relief to be obtained thereby, the anticipated effects on competition of that relief and an explanation of any special circumstances giving rise to the proposed judgment or any provision contained therein;
- (4) the remedies available to potential private plaintiffs damage by the alleged violation in the event that the judgment is entered;
- (5) a description of the procedures available for modification of the judgment;
- (6) a description and evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives;
- (7) a list of the materials available to the public as a result of the case and the places where such material is available for public inspection; and
- (8) an invitation to members of the public to send their comments on the terms of the proposed consent decree or judgment or other settlement to the Attorney General.

The party responsible for making the publication(s) shall file sworn proof of publication and copies of the notices as published by the court.

This association is not opposed to the idea of the same statement being published in the Federal Register or for that matter, as news stories in newspapers and other media. But the only way to be sure that the notice will reach the public in every given case, including those where media editors may judge to be of little news value, is to require their publication as a public notice in newspapers.

What we are asking is public notice to which the reasonable person may respond should he desire.

To the thousands of newspaper publishers whose interests are represented by NNA, public notice means nothing less than an official notice in newspapers. It is our hope that the sponsors of this important legislation and the members of the Senate Subcommittee on Antitrust and Monopoly Legislation share this concept. We firmly believe that any other type of notice to the public in this age of modern communication is woefully inadequate.

For notices to the public to serve the needs of the public, they must be designed to reach as many people as possible. Notices in newspapers are specifically designed to achieve this goal.

Let me thank you all again, and again to you, Professor Turner, my thanks. If there are questions, I will be happy to answer them.

Mr. LEVINE. Thank you very much. I have several brief questions. The most important one you addressed—the most important question of mine you addressed yourself to in your response with regard to costs. And it is good to hear that the cost will be as minimal as you indicated they will be.

Your point that not many people read the Federal Register, I believe, is a good one. And your suggestion that the public impact statement may be published in general newspapers, newspapers in general circulation, is also a good one.

I note that you recommend that the number of publications be three. And you specifically refer to that in lieu of Senator Bayh's suggestion in S. 1088 that there be seven. But I was not quite clear on why you felt that three would be adequate as opposed to seven. Could you just elaborate on that for a moment or two more.

Mr. THOMPSON. It seems to be a popular length of time; three notices.

Mr. LEVINE. Weekly? Once per week?

Mr. THOMPSON. Once per week for 3 weeks. Obviously, it is not going to get everybody, but by and large it does give people an opportunity who for some reason miss the first notice to pick up on a second or even a third.

Again, I would say it is what the reasonable person has a right to expect. If you could publish it 40 times, you are still going to miss some people. We—and this is a digression, but just for a moment—we publish mortgage foreclosure notices.

We did a study, and we noted as far as redemption of a mortgage under a foreclosure proceeding, they generally, if they were going to redeem, did it in the first 5 weeks. The notice was there. They did it within 5 weeks. Occasionally, because they were playing some money games, they would let it go to the 13th week.

We have now legislation in Michigan reducing it to five. So, apparently, something in the neighborhood of three is a good number.

Mr. LEVINE. Is there any particular day of the week which is better than any other day of the week?

Mr. THOMPSON. No, no, I happen to be a daily newspaper. So, if you wanted to have what the Senator originally proposed, that would be fine with me. But I think that notices are read by the commercial interests on a very regular basis.

Mr. LEVINE. Let me ask you one other thing just on the adequacy of the notice. I have no idea what page of the newspaper these notices are typically published upon. But I wonder whether they are sufficiently prominent so that a large cross section of the readership of the newspaper would be exposed to the notice itself or whether it is buried in some corner of the newspaper, and nobody ever sees it.

Mr. THOMPSON. Mr. Serrill would like to—

Mr. SERRILL. May I comment on that. I will give you my experience over a good many years. Some of the best read portions of the newspaper are the classified items in the newspaper.

Our readership studies show that public notice advertising rates all the way from good to excellent in newspapers. It does not have the readership of a front page story nor possibly of the comics in some newspapers. But it has a rather substantial readership. And this has been continuous over many, many years.

Mr. THOMPSON. I might also comment that in many communities these notices would be published in papers such as mine, that have a substantial readership of business and commercial interests.

Mr. SERRILL. You might comment on the number of cities that have papers.

Mr. THOMPSON. Well, almost every large community in the United States has either a weekly or a daily legal newspaper.

Mr. LEVINE. Is there a way of estimating how widespread the population is that is reached by those newspapers?

Mr. THOMPSON. I would say, from the response by people coming into our office and asking questions and things like that, a fairly high percentage I would say, because of the number of phone calls that we receive when, for some reason, either we are late getting it to the post office or the post office has a problem delivering it, our switchboard is deluged by calls, not necessarily the general public, but again from the business community, saying, "Where is my paper? I have to have it."

Mr. LEVINE. I understand. The reason that I raise that is that we have to make an assessment now, considering the fact that some costs are involved, as to whether or not the additional costs that are involved in publication in these newspapers are justified by the reach that these newspapers would have to any particular community in comparison to the reach of the readership of the Federal Register.

Mr. THOMPSON. I think without any question, considering that the notices normally would be in the \$20 to \$30 range, it is going to be very minimal for the great amount of good that is going to be done.

Mr. LEVINE. Let me ask you one final question. On page 3 of your testimony, you recommended a variety of provisions in the final bill which you set forth at length on that page.

One of those provisions was a requirement by legislation that publication be made in "one or more newspapers." And that was the specific statutory language, as I read your testimony, that you suggest. And I wonder how we assure that the newspapers selected by that statutory language will reach a significant portion of the interested population.

Mr. THOMPSON. The language is suggested to allow flexibility in each case. The question as to where the publication would be placed obviously would probably fall to the Attorney General as he would be the one preparing it. I would suspect that in—for instance, we publish

many notices of the Alcoholic Tax Division for the auctioning off of a car that has been seized, and they have many, many responses.

So, I would presume that they would place that notice in our area because they know that is going to be read. They could obviously place it in one of the huge metropolitan papers, but the legal rate in those papers is substantially higher. So, in the interest of both informing and economy, I think notices would go into a legal paper. In a smaller community like East Tawas, Mich., they would probably go into a community paper because the rates are almost identical.

MR. LEVINE. I have no further question, but Senator Tunney asked me to thank you very much for testifying and to apologize to you personally.

MR. THOMPSON. It has been very enlightening to be here. Thank you. Are there any other questions?

MR. CHUMBRIS. All I want to do is to welcome you back. I had you over on the Newspaper Preservation Act.

MR. SERRILL. We have been in this room before, Mr. Chumbris. We recognize the participants.

MR. THOMPSON. Thank you very much.

[Whereupon, a brief recess was taken.]

Senator TUNNEY. The hearing will reconvene.

Our next witness is Mr. Donald—Prof. Donald F. Turner. It is a great pleasure to have you with us, Professor Turner. I know that there are few people today in the United States who are more intimately acquainted with the problems attendant to the enforcement of antitrust laws in this country than are you.

I believe the first time we met, back in 1965, when you were the Assistant Attorney General in charge of the Antitrust Division—I certainly want to welcome you to the committee, and I sincerely appreciate the fact that you would have come down from Cambridge and have given us the opportunity to benefit from your wisdom in this area.

STATEMENT OF PROF. DONALD F. TURNER, LAW SCHOOL OF HARVARD UNIVERSITY

DR. TURNER. Thank you very much, Mr. Chairman, and I appreciate the invitation.

As has been disclosed in these hearings, I wrote a letter to you about a week ago, in which I suggested some substitute provisions for your bill, which I believe would substantially meet the objections that have been raised by present and past enforcement officials who are concerned—and, I think, legitimately so, and I am sure that you realize this—with the real possibility that the bill, as drafted, would tend to encourage intervention or attempted intervention in run-of-the-mill antitrust consent decrees, and that this would impose—and, I believe, rather unnecessarily—additional burdens, both on enforcement agencies and the courts.

What I suggested was that what appears to me to be the principal concern—and it is a real one—which led to the proposal of this bill, namely, that the Department of Justice consent to decrees only after very careful consideration of all relevant factors, and that they not consent to decrees under undue pressure of any kind—these could

be met without establishing as a routine the kind of procedures that you have set forth in your bill.

Hence, my basic suggestion was that the requirement that the Government file with the court and make public a statement of the reasons why it believes a particular decree is in the public interest be limited to those cases in which the decree departs in material respects, in major ways, from the relief that has been requested in the complaint, or from the relief that is normally obtained under established legal principles for the kind of violations alleged.

Now, it seems to me that those are the cases in which the possibility that the public interest is not being well served is a real one; that in cases in which the decree substantially meets the relief requested in the complaint or is what is normally obtained for violations of that kind, that there is no necessary—indeed, it is likely to be a waste of effort—to have any sort of full inquiry into that.

You will notice that in making my proposal I did not want to create any implication that the district courts would be deprived of the power which they now have to request the Government to state its reasons in any case in which the court thinks it ought to. Obviously, that should be retained.

But it seems to me that the major purpose of the bill can be served by attempting to limit its scope insofar as routine cases are concerned.

I would like to add one thing further. In the proposed revisions that I sent you, I deleted altogether subsections 2(d) and 2(e), as contained in the present bill. Let me say that I do not think there could be any serious objection to retaining the first sentence of subsection (d), which simply provides that before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of that judgment is in the public interest.

I see no real objection to that. I think that is thought to be the established law now, but it seems to me that, certainly in the kinds of cases that we are likely to be most concerned with, that simple provision would be a not inappropriate one.

I would still, however, think it preferable to eliminate the balance of 2(d) and 2(e) on the grounds that I just do not think they are necessary.

I think the courts currently have ample powers, as they have demonstrated, to follow whatever procedures are necessary to make any necessary inquiry in determining whether the decree is in the public interest.

My concern really is the same as the one expressed by Judge Wright: namely, that to specifically spell these out might be taken as an indication to district judges that they really ought to follow these procedures more often than not.

I would agree completely with him that that would not be appropriate. I just do not think that it is necessary to go into that kind of detail.

Now, I think that that is all that I would have to say preliminarily. I will be happy to answer any questions.

Senator TUNNEY. When you refer to excessive costs in your letter to me of S. 782, would you spell out some of the specific costs that you are referring to?

Dr. TURNER. Well, the bill requires the Department of Justice to file a statement, together with every consent decree, spelling out all of the things that the bill spells out—nature and purpose of the proceeding, description of the practices, explanation of the proposed judgment, and a description of alternatives to the proposed judgment, and so on and so forth.

It also provides that the Department must entertain and must make a written response to all comments and all objections.

You know, this takes time, and the expense may not be overpowering, but where the case is a routine case, where it is a routine complaint and the decree is responsive to the allegations in the complaint—provides all or approximately what relief you would normally get—it just seems to me to be unnecessary to incur these costs.

Second—and, of course, this is a speculative matter, and speculation is always risky—it would be my prediction that if the bill were passed in its present form there would be attempted intervention in more cases than not.

There is, as I am sure you are aware, a growing, active private plaintiffs bar, antitrust bar. Almost inevitably, if there is a Government case, there are going to be private suits in the wings.

The prospective private plaintiffs have their lawyers, and their lawyers, if they are good lawyers, are going to do all they can to do what they can do for their clients within the dimensions of the Government's case.

It just seems to me highly probable that there will be fairly extended, fairly common efforts to intervene in even fairly routine cases.

Even if intervention is denied, as a matter of routine the Department does not object to a court hearing what they have to say, and there will be some proceedings of some duration. They may be fairly abrupt, may be fairly brief; but in the cases that we have had in the past few years, in which private parties have attempted to intervene, the proceedings have not been inconsiderable.

Almost invariably, the parties, one or the other parties, after the court has entered the decree, have appealed to the Supreme Court. This has necessitated further work within the Division and in the Solicitor General's Office to file answering papers to these appeals.

Really, what I am saying is: I could not attach any quantitative measure to these costs. The question I raise is: Why? Why impose these or run the risk of imposing these where there really is not much purpose to be served?

I do not think there is much purpose to be served, at least not enough of a purpose to warrant these kinds of costs, where the cases are one in which the consent decree pretty closely tracks what you would expect the Government to get after litigation.

Senator TUNNEY. Well, of course, the purposes to be served are better enforcement of the antitrust laws through public ventilation of the consent decree procedure.

It was interesting that Ralph Nader, in his statement, indicated strong support. In his statement he said, "Let's try it for 4 years."

He also, in his statement, said that if this is considered a provision which is going to unduly prolong proceedings, why not impose a deadline and increase resources.

I wonder what your answer to that is. Why not impose deadlines?

Dr. TURNER. Well, I just do not think that is a workable proposition, Mr. Chairman.

I think in a case in which there is enough question involved that the judge feels it is appropriate to go into it in some detail, there should not be a time limitation on that.

You cannot say that proceedings will be wound up in 60 or 90 days. You would, at the least, have to say that unless the judge finds that the circumstances warrant extension of the proceedings, the proceedings shall terminate in 60 or 90 days. You would have to do that.

The trouble with that is that the maximum sort of becomes the minimum. That is, if you say they cannot go on for over 90 days, you raise the real possibility that in cases where they should really be disposed of summarily the proceedings will go on for the maximum time allowed.

So I do not think that is really a workable suggestion.

As for the proposition that the bill have a time of life, let us say 4 years, well, not being convinced that beyond what I have suggested is really worthwhile, obviously I do not see much reason to try it for 4 years.

I think the results would be probably rather indecisive. Oh, maybe after 4 years you would have a record that you could quantify and the Department could establish precisely how much resources had to be devoted to consent decree proceedings. You would then be in some position to make an estimate.

But if, as I suspect, it will not be inconsiderable, my question is: Why buy into it in the first place?

Now, Mr. Nader also raised, I think, a very valid point in connection with that. He said that maybe then after 4 years we would be able to determine whether the objections rest on excessive cost or on some fundamental philosophical difference.

I am frank to admit that probably something of the latter order may well be involved. I think Mr. Nader's fundamental proposition is that antitrust enforcement, antitrust law in a substantive way, would be improved by increasing the role of so-called private attorneys general.

I do not agree with that. I just do not think that is so. As I look at the history of private antitrust suits, while they are obviously a necessary adjunct to antitrust enforcement, I am not persuaded that, other than the sanction and the deterrent that private suits impose, it has really improved antitrust enforcement policy.

If you ask me are there any Supreme Court decisions that I think were wrongly decided or were highly questionable in the last 10 years. I would say yes, and every one of them is a private law suit.

Senator TUNNEY. Every one is what?

I would say yes, and every one of them is a private lawsuit.

Here is the problem: The private antitrust lawyer's job—and rightly so, this is his profession—is to win a case for his client any way he can, legitimately; that is, by any kind of argument he can make.

He has no inhibitions, other than inhibitions that any sensible lawyer would have, about trying all kinds of theories, of making use of all kinds of past decisions, whether those past decisions made any sense or not.

His job is to get the most for his client that he can.

It seems to me that the kind of antitrust law you get out of that kind of an approach is not likely to be a highly rational antitrust law.

Now, I would be the last to say that the Government enforcement agencies have always been rational or that their policies have been beyond question—obviously not.

But the Antitrust Division at least, unlike the private plaintiffs, is not in the position of saying to itself, "Should we file a case just because we can win it; and when we do file a case, should we try to win it any way we can?"

A responsible Government agency does not do that. It does not bring a case that it really thinks, as a matter of rational antitrust, should not be brought.

And when it brings the case, if it is operating properly, it does not try that case on any kind of kooky theory that might possibly win.

So, by and large, my firm belief is that for better or worse, we are much more likely to get rational antitrust policy and rational antitrust decisions if the main laboring oar is carried by the Department of Justice and the Federal Trade Commission.

This is not done in secret. I think secrecy is greatly exaggerated. I think you well know, and I certainly know from my experience, that everything that the Department of Justice does is very well known, at least by those people who are primarily concerned by it.

They write to Members of Congress. They write to Representatives, they write to Senators, who send inquiries. The enforcement officials are repeatedly testifying on the Hill, and are often asked to defend their policies.

This is not done in secret. When a case comes along that seems strange, there is immediate questioning, and that questioning has to be responded to.

To get to what Mr. Nader calls a basic philosophical issue, I really believe quite firmly that it is a good thing to have some coherence and direction to antitrust, and that that can only be done by having it primarily lie in the hands of the Government enforcement agencies.

To be sure, they obviously do not know everything. They may not be as imaginative as some other people, and some rather imaginative and very good theories have come out of private cases. But there is no need, for any greater stimulation of that by this vehicle, that is, the vehicle of consent decrees.

Primarily, the contributions that are made are not in consent decrees, although there can be some; they are on substantive issues of liability.

But we have now—as the cases of recent years demonstrate—ample opportunity for any private interest to come to the court when a consent decree is filed and say, "We do not think this decree goes far enough. There are provisions for compulsive patent licensing. They are not nearly as helpful as they might be if you had this or that in it."

The Department of Justice is made aware of these suggestions; the court is made aware of these suggestions. It seems to me, as I said, that there is ample room for that now.

This is why I do not see any reason for further encouraging this, certainly no reason to further encourage intervention as of right,

which is very likely to lead to appeals, which is a real prolongation of proceedings.

You earlier mentioned costs. You know, one of the costs of prolonged proceedings is simply a loss of time. The effectiveness of the decree is suspended for the duration of the proceeding.

Appeal to the Supreme Court and the processing of that takes a matter of months.

I just do not believe that that should be encouraged as a matter of course.

Now, I agree with you, your bill does not do that. It does not say explicitly that broad rights of intervention should be broadened. It does not say the court should do this. It is purely suggestive. It says it may.

I think Judge Wright's comments are correct on this; that when you put this kind of language in a statute, you are really leaning on the judges to do more, considerably more than they have.

Senator TUNNEY. Well, we certainly are intending to have the judges do more than they have done, yes, because many judges just rubber-stamp the consent decree.

That might be just fine for the Antitrust Division, but I am not convinced that it is fine for the public interest. I think that you have a situation where, in every instance, the public interest, although it may be inchoate at time, is relatively clear.

But, on the other hand, the enforcement policies of the Antitrust Division change with succeeding administrations.

Dr. TURNER. That is correct.

Senator TUNNEY. It seems to me that one of the ways you can give the public an opportunity to be sure, in every instance, despite what the administration policy is, it is protected would be to have a little greater ventilation of what went into a determination that it was in the public interest to get a consent decree.

Now, we do say, for the purposes of the determination that it is in the public interest, that the courts shall consider the public impact of the judgment, including termination of alleged violations, provisions for enforcement modification, duration of relief sought, anticipated effects of alternative remedies, and any other considerations bearing upon the adequacy of the judgment.

Now, I do not know how you could make a consideration or how you could make a judgment—excuse me—that the decree was in the public interest without going through that kind of mental gymnastics. I suppose you could.

Maybe you could make some suggestions as to how you could do it. I do not see it. I think you have to go through that thought process. Why not spell it out? Just say that you have to go through it.

I have less concern with your objections to (e) than I do with (d), because I think that (d) is essential for purposes of the bill.

In other words, we want the courts to do more than they have done in the past. We want them to do more than just simply rubberstamp a decree.

Dr. TURNER. Well, this is why, as I said at the outset, I would certainly not object to putting in the first sentence of (d).

I do not think there is any need to spell out what the judge ought to look at to see whether it is in the public interest. There are some things, of course, that I really do object to.

The suggestion of the public benefit to be derived from a determination of the issues at trial—I find it almost impossible to conceive of a case in which it would be in the public interest to have a full trial of a case where the Government has secured all of the relief it could possibly get on a successful conclusion of litigation.

Senator TUNNEY. I agree with that.

Dr. TURNER. I think the suggestion that that would be in the public interest borders—I hate to use the word—on the preposterous, given the fact—as Judge Wright points out—that where the problem is one of getting private plaintiffs access to evidence, it can be solved and is being solved in other ways. But the idea of having a public trial simply for the purpose of making a spectacular demonstration of a defendant's past sins, I just find that unacceptable.

Senator TUNNEY. But your postulate is that the consent decree is going to provide for everything that the Government asked for in its complaint. What about situations where it does not provide everything that the Government asks for in its complaint? Why shouldn't the judge make a decision—

Dr. TURNER. In the first place, as I said, I would not fool with a case as much at all unless this was true—I mean, unless relief was way below what was requested.

But let us just look at it for a minute. Let us suppose that the Government has accepted less in the way of relief than it might get if it went to trial.

How would a judge go about determining whether a trial would be in the public interest?

He would almost have to see all of the evidence the Government was going to put in, in order to be convinced the Government was going to win the case. If the Government is not going to win the case, I do not see how there is any public interest in having a trial.

That would be the necessary predicate, that it is a cinch the Government is going to win.

We would also have to be convinced that even if the Government won, that the additional relief would, in fact, be given.

You could never know that for sure because trials and appeals typically take an awful long period of time. It may well be, by the time you get around to fashioning relief, circumstances are so radically changed that the relief would not be appropriate any more anyway.

Let me give you a specific example. Suppose it is a merger case, and the Government has accepted less than full divestiture of what was acquired.

Now, actually that is pretty unusual. ITT is the only recent example I can think of, apart from some cases where the companies have almost gone bankrupt, and in that situation you usually just dismiss the case.

Suppose the Government, for one reason or another, has decided to accept less than full divestiture of what was acquired. Suppose you try the case and it takes 2 or 3 years, and at the end of the proceed-

ings the company then is in very serious financial circumstances. It is perfectly plain that divestiture would bankrupt it, and you could not create a viable company out of what you divested anyway.

You have not gained anything.

I think what the judge should do—the proper thing for the judge to do—if he thinks the Government should not have accepted relief less than divestiture in a section 7 case, is not to say, “We will have a public trial.”

He should simply say, “I will not accept this decree,” and let the parties decide what they are going to do after that. That, it seems to me, would be the appropriate thing to do, say, “I will not accept this decree. If this is a violation of section 7, the decree should provide for divestiture, and I will not accept a decree that does not.”

Senator TUNNEY. Well, I think you articulate your point of view cogently. It may convince me, insofar as (d) (2) is concerned. You still have not convinced me as far as (d) (1).

Dr. TURNER. Well, that is—I cannot make an all-out attack on that, Mr. Chairman. I think, again I would substantially agree with what Mr. Kauper had to say about this last week.

You are asking the judge to go into a lot of speculation. Again, I think my primary concern is with doing that in cases where there is not much point.

Let me put it this way: I think if you passed a bill that says that district judges, before entering any consent judgment, shall determine that entry of that judgment is in the public interest, that you will have done your job.

There will be people coming in, complaining that it is not, and they are going to bring to his attention precisely the kinds of things you spell out here. They are going to say, “The alternative relief would be more effective, and this decree is not, and this will have this impact or that impact.”

I just do not think you have to spell it out. There may be some things that you left out here that ought to be in. I mean, if you ask for a catalog of what a judge ought to consider, maybe there is not enough.

Senator TUNNEY. Right.

Dr. TURNER. I think this is a case where I do not think specificity is necessary. I think that the problem will take care of itself.

Senator TUNNEY. I am intrigued by your trigger concept, and I believe that that concept, as spelled out by Jim Campbell and by you, might be a very constructive approach to the legislation.

Are you aware of Judge Lee Loevinger's suggested trigger? It was that in a case certified for expedition, pursuant to the standard at section 6 of our bill, that the Expediting Act portion of the bill—a case of general public importance. That was his trigger, a case of general public importance.

Dr. TURNER. Well, you are moving now to a discussion of the Expediting Act proposal.

On that, let me make a few brief comments.

Senator TUNNEY. Yes, you know he has applied it to the consent decree.

Dr. TURNER. In other words, that consent decree part would only apply in a case of general public importance?

Senator TUNNEY. Correct.

Dr. TURNER. And who determines that under his proposal?

Senator TUNNEY. I would assume that it would be determined by the court.

Dr. TURNER. Well, one tends to like his own ideas better than others. I think mine is a more appropriate trigger. I think that if your concern is with ineffective relief—that is, with relief which has been induced through lack of attention to the relevant facts or through undue political pressure—it seems to me that my proposal is much more directed to that than Mr. Loevinger's.

You may have a major case in which the Government, by a consent decree, gets everything that it could possibly want or hope to get. So that I would say, why bother too much with that case.

You may have a rather small case in which unwarranted political pressure has been brought to bear, which would not be covered by his proposal.

Indeed, without getting specific, my recollection is that the noise that I would get from Members of Congress, simply transmitting their constituents' complaints, was not correlated to size. Very often in very small cases we would get a heck of a lot of fuss.

Senator TUNNEY. Counsel informs me that Nader opposes your trigger, and he opposes it because currently a complaint and a consent decree filed simultaneously and—

Dr. TURNER. Well, that is, I think a point worth considering. As you recall, in my letter, the draft that I proposed had some bracketed material. I said that in any case in which the proposed consent judgment deviates in major respects from the relief requested in the complaint—then I had brackets—or from the relief normally obtained for the kind of violations alleged.

His point, I think, really suggests that maybe that alternative language ought to be kept in. I believe that would solve his problem.

I take it what he is afraid of—I must say I think his fear is substantially unwarranted, but that is neither here nor there—what he is afraid of is that, if the language simply referred to the complaint, the legislation simply referred to the complaint, that there might be cases in which the Government would doctor up the complaint, and request only very modest relief in order to avoid the impact of the bill.

Now, as I say, I find that highly unlikely. But that problem would be met if the bracketed language that I suggested were included.

Then, for example, if the case were a merger case and the complaint was drafted so as not to request divestiture and the consent judgment did not ask for divestiture, the Government would be forced to explain why it did not ask for the relief you normally ask for.

Senator TUNNEY. Well, let us take a look at the first page of your letter.

You indicate that as long as the Antitrust Division receives the relief requested in the complaint or what is normally received after adjudication of violations, the decree should not be questioned.

Now, in light of Mr. Nader's comments, I am wondering if the procedures of S. 782 would not reveal that the Department of Justice should seek more or different relief than it asked for in its complaint or that it normally receives.

Dr. TURNER. Well, this is a point that I believe we were talking about some minutes ago, where I suggested that it may well be that in a

particular case the private parties coming in would have some novel or useful suggestions as to what would be necessary or appropriate in this case that is not normally obtained.

I do not dispute that. The issue, then, reduces down to whether it is necessary to have additional legislation in order to get the benefit of those suggestions.

My argument is that it is not; that this is being done now; and that you do not—there is not a need to go through all of the procedures that you have suggested here, including the Government's filing a public statement as a routine matter, in order to get that benefit.

I would like to add one thing, Mr. Chairman, and that is that very often the suggestions are very bad ones; that they do, indeed, request more stringent relief, but the proposals are not good proposals.

Let me give you a couple of examples. I think you may have seen my remarks that I made last November, and I will just draw on those.

You see, competitors of a defendant have a private interest in seeing him as crippled as possible. This is another aspect of the problem I mentioned earlier, that they have a predominant private interest, which may be inconsistent with the public interest in competition.

They may, for example—suppose the decree, in a case where patents have been an important element, provides for dedication of past patents or compulsory royalty-free licensing of past patents, patents to date—which, incidentally, is a provision that the Department has frequently gotten in consent decrees, although the legal foundation is rather shaky.

(The last Supreme Court pronouncement on the subject suggests that this might be unconstitutional, as a deprivation of property without due process of law. I do not think that would hold now.)

Private intervenors—competitors—may come in and say, "We want not only dedication of patents to date, but we want a provision in the decree that we get free access to any patents that the defendant comes up with for the next 5 or 10 years."

Now, some might view that as a more stringent provision of the decree, and, indeed, it is. But it is highly questionable, to say the least, that that would be a desirable feature in the decree, because it would make any future research by this company profitless, and they would have no incentive to engage in research and the economy would pay for that loss.

There are other kinds of provisions that they might want—they might want inhibitions on the company's growing by internal expansion, a provision prohibiting the company from expanding or building new plants or going into other lines of business.

They would love to have that to keep out the competition, but it would be an anticompetitive provision in the decree. It would not be in the public interest.

So, you know, you can get good ideas and you can get bad ideas. I would just leave it the way it is. Let them try them out. I do not—I just do not think there is a good basis—and this goes back to what I was saying earlier—for regularizing private intervention for purposes of altering decrees that seem relatively unexceptionable.

Senator TUNNEY. Well, one area that is, of course, related—that is, Mr. Kauper testified that he thought that it might be a pretty good

idea for the division to issue a press release, setting forth the details of the consent decree.

Now, why would a public impact statement be any more difficult than a press release? I mean, wouldn't you have to go through the same thought processes?

Dr. TURNER. Well, maybe it would not be too much of a burden, because you would end up boiler-plating it. I think if I were the Assistant Attorney General, I would have some standardized forms developed in a relatively short period of time for the classic kinds of cases, and I would just say to my staff, "Change the names and put it out."

Senator TUNNEY. So you do not think that it would—do you mean a press release or a public impact statement or both?

Dr. TURNER. Either one. If you say you should put out a full press release, describing the violation that was alleged and what you think the decree ought to do, I do not—

Senator TUNNEY. I am afraid that you might be right.

Dr. TURNER. I do, however, think that the mandate to give a full statement of all alternatives—I do not see any point to that.

Senator TUNNEY. Do you think that some sort of safeguard is needed before consent decrees are entered in FTC cases?

Dr. TURNER. Well, I think, Mr. Chairman, the problem is very much the same. In a sense, the problem is even more severe there, because there is no way that a Federal Trade Commission proceeding is going to be effectively reviewed.

Well, I guess it is not any more severe. Typically, the scope of review of an administrative agency is considerably less than the scope of a review that a court gives a case of its own.

I think you have much the same problem. If it is appropriate to have this kind of a requirement for the Department of Justice, the Federal Trade Commission ought to be asked to do that same thing.

In other words, you should say that the Federal Trade Commission, in any case in which its consent decree deviates in a material way, it should issue a public statement.

Now, there will not be any court to give it to in a Federal Trade Commission case. The only way a court could get hold of it—they do not submit the proposed decree to a court; they simply enter the decree and that is that. So you necessarily would not have that.

As you know, there is dual enforcement. They handle much the same kinds of cases as the Department of Justice. They clearly have dual responsibility on merger cases.

So if it is appropriate for the Department of Justice to state its reasons publicly for accepting a particular consent judgment, it is appropriate for the Trade Commission, too.

Senator TUNNEY. Well, I really appreciate very much your coming down and testifying, Professor.

I think you are in a unique position to give us valuable advice on this legislation because you are a scholar of antitrust law and, at the same time, you have been in a position where you had to implement the law and enforce it.

So you do have a double perspective, which is really quite unique. I do not think that there is any former—is there a former chief of the Antitrust Division who is also a professor?

Dr. TURNER. No; but when—in due time, when Mr. Kauper leaves, he may be the second to fall into that category. He came from academic life. Whether he will return or not, I do not know.

You are very kind. I am not sure I live up to the billing. There are those who would say I do not.

Senator TURNER. You have been a great help. I appreciate also your letter, which I will now incorporate into the record. I also will incorporate Prof. Richard Buxbaum's from the University of California School of Law, Boalt Hall, with several attachments; and Prof. Donald Knutson's of USC Law Center; and also a statement from the Computer Industry Association on S. 782.

[The documents follow. Testimony resumes on p. 420.]

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., March 20, 1973.

Re S. 782.

MELDON LEVINE,
*Legislative Assistant, Office of the Honorable John V. Tunney, U.S. Senate,
Senate Office Building, Washington, D.C.*

DEAR MEL: I enclose a letter and a copy of my paper for use in the above-referenced hearings, and hope that you find both appropriate.

In addition I enclose copies of the two papers which I have particularly recommended to you. The *Chicago* study is concerned with the conflict between full participation during consent decree hearings and the use of evidence elicited at such a hearing as prima facie proof in later civil actions in violation of the policy behind the consent decree settlement procedure. I do not think the fears are overly realistic, but in any event your bill takes care of the problem. The *Pennsylvania* comment is an excellent review across a wide range of administrative procedures—including antitrust "prosecution" agencies—of such public participation matters and is very useful for general support. As it happens the Administrative Conference of the United States has published an excellent series of papers on opening the administrative processes of many agencies to increased public participation. Even though most of these have stressed traditional agencies rather than Departments or prosecutorial arms of the Executive, I think much of the learning bears directly upon the Antitrust Division as well as upon similar operations. Thus I would urge you to include a study of the general direction of those papers in the hearings as further useful evidence.

With best regards.

Sincerely,

RICHARD M. BUXBAUM.

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., March 20, 1973.

Re Hearings on S. 782—Antitrust and Legislation Subcommittee.

HON. JOHN V. TUNNEY,
*U.S. Senate,
Senate Office Building, Washington, D.C.*

DEAR SENATOR TUNNEY: Thank you very much for the invitation to submit a statement for consideration as a part of the hearings by the Antitrust and Legislation Subcommittee of the Committee on the Judiciary on S. 782. My comments of necessity will be somewhat informal: for technical material on the subject of these hearings I take the liberty of referring you to my article, "Public Participation in the Enforcement of the Antitrust Laws" (Vol. 59, *California Law Review*, September 1971), a copy of which is attached as an appendix to this letter. You will understand, of course, that my interest is that of a law teacher and researcher interested in this area, and that I write in that capacity only. I hold no brief from anyone in this matter, and my remarks do not reflect any position of the University of California.

Section 3 of S. 782 is long overdue, and I do not suppose that there is much controversy about the need to bring the penalty provisions of the Sherman Act to the minimum level of deterrent effect available in a \$500,000 penalty. Two

comments, however, may be useful even on this matter. First, the Commission of the European Communities since 1962 has been empowered to levy penalties of roughly \$1,000,000, and in aggravated cases 10% of the gross revenues of the offending company even beyond that limit. I believe acceptance of this level of deterrence in a society fully comparable to ours as to level of industrialization and forms of enterprise activity is an important and persuasive fact for consideration in our debate on this matter. Indeed, the interest in harmonization in national antitrust enforcement efforts often voiced by the relevant segments of the antitrust bar is equally appropriate here. Opponents of such higher administrative penalty levels might argue that such greater deterrence is made available in Europe to the administrative enforcement bodies because of the relatively undeveloped nature of private antitrust enforcement activity, which looms so large in the United States. Apart from the fact that such an argument perverts the normal priority of administrative over private enforcement, its premise is less and less correct as to the prevalence of private claims in Europe. Interest in such litigation is growing and there is no doubt in my mind that in the near future we shall see a substantial amount of it existing side by side with administrative actions. Furthermore, private antitrust enforcement is lacking in exactly the kind of situation in which high penalties are most appropriate.

This indeed is the substance of my second comment: In my opinion there is a clear negative correlation between the kinds of anti-competitive behavior and structural changes most often challenged by private treble-damage litigation and those most deserving of high penalties. Only the most aggravated and admittedly inexcusable price-fixing and production or output-sharing conspiracies deserve, and today get, the higher penalties; but these behavior patterns, usually aimed at the consumer public generally, are the most difficult to redress through private action. The trend is away from acceptance of unmanageable and amorphous class actions, and I suspect that a factual investigation (which I have not made on this point) would turn up few successful cases of this sort. In short, cases like the electrical conspiracy private actions, brought in the main by utilities and municipal governments impelled to do so by their particular "entrepreneurial" structure, are the exception rather than the rule. The typical treble damage action occurs in the distribution sector, involves reasonable legal and factual defenses, and would not usually involve any real risk of double punishment.

I have long been a proponent of the kind of openness in agency processes and availability of at least limited adversary procedures provided in Section 2 of S. 782, and fully support the proposed enactment. The analogy of the public impact statement with the environmental impact statement is at least to this extent appropriate: consideration of the "second order", broader consequences of agency action must be an essential element of the administrative process of settling antitrust actions through the consent decree mechanism if that process is to retain its legitimacy in the long run. Decisions to settle prosecution—and indeed, even "decisions" not to initiate prosecution in the first place—are now the main part of the Antitrust Division's activity. Neither the arguments involving prosecutorial discretion nor those involving administrative efficiency can long insulate the Division from the obligation to justify its activities on the basis of just such long-range and broad economic and social concerns as are subsumed in the "public impact" notion. The agency itself claims that it is aware of and uses these factors in its decision-making. If that is so, then the requirement to articulate just these factors, which S. 782 would impose, can hardly be claimed to be burdensome to the Division in the sense of imposing a new in-house procedural requirement or a new substantive and distortive element to its decision-making. To put it in a nutshell: The internal memoranda should already contain and discuss these elements, and if they do not, we have all the more reason to be concerned about the claim to legitimacy, and to privacy, of the present system.

Those provisions of S. 782 concerning the judiciary require only moderate changes in present practices; certainly the permissive provisions mainly are useful to persuade judges that they have these powers. As you said in your introductory comments reported in the Congressional Record for February 6th, the amendments can best be seen as an effort to "remove any aura of extraordinariness" from a judicial determination to play a meaningful role in the approval of consent decrees. I found in my own study that a variety of informal objector-hearing procedures abound. Even decisions that seem to reject formal intervention, as illustrated by the well-known opinion of Judge Blumenfeld in

the recent Nader-ITT-Hartford intervention effort, often review most of the claims of the putative intervenors on the merits. Nevertheless, the fact finding procedures often leave much wanting, and it is important to encourage experimentation with forms of adversary presentation reasonably geared to elicit meaningful arguments in these cases. I hope these provisions will encourage such explorations. The calling of expert witnesses and the use of references to masters are specifically to be welcomed. As for the requirement that the court make a finding that entry of a consent judgment is in the public interest, I am uncertain what level of burden, if any, this would entail. I assume, however, that such a finding is implicit in any entry of a consent judgment, and will be a matter of fuller articulation only when third party opposition has surfaced to a specific settlement—and that is as it should be.

Finally, I agree with the effort to harmonize these more open proceedings with the existing proviso that such consent judgments shall not be available as *prima facie* evidence of law violations for later private actions, though I am not sure that this ever has been a realistic stumbling block to a more active judicial role. I have no comments on the "record of contacts" provision or on Section 4 of S. 782, due to lack of experience with these matters.

Thank you again for requesting and accepting these comments. I hope they are of some use to the subcommittee's and any later deliberations, and I stand ready to amplify or explain any of them if any committee member so desires.

Sincerely,

RICHARD M. BUXBAUM,
Professor of Law.

Enclosure : Article.

Public Participation in the Enforcement of the Antitrust Laws

Richard M. Buxbaum*

The United States enjoys the reputation of possessing a long and vigorous tradition of antitrust enforcement. However, the length of the tradition is in fact a matter of some doubt. Its vigor has emerged only in recent years, as the courts have supported attacks upon traditional patterns of distribution and upon existing structures of American industrial organization. With this activity has come an attendant increase in criticism: criticism of the enforcement pattern itself, and criticism of the role of antitrust laws in modern economic organization.¹ At the same time, economic affairs have become a central concern of government—a concern not new in principle, but new in its intensity and in the range of means available to implement that concern.²

The present study attempts to explore specific enforcement mechanisms as they affect the implementation of current antitrust policies. Preoccupation with substantive antitrust law doctrine on the part of experts in this field now threatens neglect of what has become the more important problem of antitrust enforcement doctrine.³ The preoccupation is understandable, given the newness and completeness of the substantive doctrinal revolution we have witnessed, even though the theory and empirical economic studies justifying it are not all so recent. This Article briefly reviews the doctrinal development and its theoretical and political support in an effort to explain why we have arrived where we are. The major part of the discussion, however, focuses on the enforcement pattern that this development has engendered, the dan-

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1. See, e.g., Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Dam, *Fortner Enterprises v. United States Steel: "Neither a Borrower nor a Lender Be,"* 1969 SUP. CT. REV. 1; Kauper, *The "Warren Court" and the Antitrust Laws*, 67 MICH. L. REV. 325 (1968).

2. See generally Buxbaum, *Antitrust Policy in Modern Society*, in DAS UNTERNEHMEN IN DER RECHTSORDNUNG 345 (1967); Cook, *Merger Law and Big Business*, 40 N.Y.U.L. REV. 710 (1965); Sullivan, *Politics, Planning and Trade Regulation*, 16 U.C.L.A.L. REV. 1 (1968).

3. See Buxbaum, Book Review, 68 COLUM. L. REV. 1618 (1968); Dam, *supra* note 1, at 40.

gers and inadequacies of that pattern, and possible improvements in antitrust enforcement policy.

I

SOCIAL VALUES AND ANTITRUST POLICY

No exploration of the forces of substantive law and enforcement can have form or focus without at least some tentative value judgments guiding the evaluation of success or failure in the enforcement of any given antitrust policy. In general, and with the reservation noted below, I subscribe to the school of opinion expressed in the following quotation from Kaysen and Turner:

The most important aspect of the competitive process is that it is self-controlling with regard to private economic power. For all the important qualifications and limitations of the doctrine of the invisible hand which modern economic analysis has produced, that doctrine remains the basic political justification for an enterprise economy in which major economic decisions are compelled and coordinated through the market. It is the fact that the competitive process *compels* the results of its processes which is the ultimate defense against the demand that economic decisions be made or supervised by politically responsible authorities. Without such market compulsion, that demand appears irresistible in a society committed to representative government.⁴

My reservation to this statement concerns the conflict between certain goals of today's society and certain assumptions and expectations postulated by the classical theory of competition that informs the quoted passage.⁵ Put crudely, the classical process achieves its utilitarian aims—maximum utilization of scarce resources to produce the most products at the least cost—by means of an ongoing cyclical pattern around the never-achievable ideal of optimal resource allocation. This pattern may bring with it unemployment and bankruptcies on firm and even industrywide scales as it moves over time about the hypothetical optimal position. Today, however, unemployment and large-scale bankruptcies are evils; they are stated to be such by legislative commands expressing certain values, legitimate by definition, of democratic society. The clearest example is the "magic quadrangle": the stated desire for full employment in a stable and noninflationary system, with a constant expansion of the real standard of living. The classical theory expects these goals to be achieved, but allows shortrun defeats on the way to their realization. It is just these shortrun de-

4. C. KAYSEN & D. TURNER, *ANTITRUST POLICY* 48-49 (1965) (footnote omitted). See also J. DIRLAM & A. KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 16-18 (1954).

5. The following vulgarization borrows from Buxbaum, *Antitrust Policy*, in *LAW AND INSTITUTIONS IN THE ATLANTIC AREA* 517 (E. Stein & P. Hay eds. 1967).

feats, however, that are no longer acceptable as a matter of governmental policy, and more to the point, that are fought by today's administrative bureaucracies, in great part because of the pressures of popular-party and interest-group government.

These shortrun defeats are fought by an ever-expanding arsenal of devices, including the informal, "back stairs" manipulative and persuasive methods made notorious by their use in the steel-price fights of some years ago.⁶ More relevant to our discussion, these so-called evils can be fought, though at unknown cost, by relaxing the vigorous application of antitrust law. Since the combat against these evils is by definition legitimate, hesitancy to go the whole distance on antitrust law enforcement may indeed be proper. The problem is one of striking the proper balance: a decision not to enforce antitrust principles is never free of cost; the same is true of any decision deprecating the primacy of the above-mentioned "overriding" values.⁷

This clash of values creates a secondary, but no less difficult problem. While the enforcement of the antitrust laws is seen in the context of discrete legal decisions, the issues in controversy involve disagreement over vaguely stated matters of policy. The single enforcement decisions should not be arbitrary or inordinately unpredictable; the prosecutorial discretion concerning the filing of a complaint—whether civil or criminal—cannot go so far as to mock the substantive rules that are supposed to be enforced.⁸ On the other hand, the substantive standards must be broad enough both adequately to cover the entire range of undesirable practices and structural situations, and adequately to subsume the legitimate shortrun considerations already described. As a result a dilemma is apparent in the enforcement picture. The breadth of the substantive law required for adequate control of potential structural and behavioral aberrations creates the danger of either a politically impossible and irresponsibly rigorous level of enforcement, or a dangerous amount of freedom in a field far removed from those traditionally subject to accepted standards of prosecutorial discretion. Such wide discretion, even if politically responsible and apolitically fair, is still unpredictable and arbitrary from the point of view of industry. In addition, given the prevalent erosion of the presumption that politically derived power is exercised more responsibly than economically derived

6. See generally G. McCONNELL, *STEEL AND THE PRESIDENCY*, 1962 (1963).

7. See Sullivan, *supra* note 2, at 34-35.

8. See, e.g., *An Interview with the Honorable Donald F. Turner, Assistant Attorney General in Charge of the Antitrust Division*, 34 ANTITRUST L.J. 113, 125-27 (1967); Zimmerman, *Views from the Antitrust Division*, 37 ANTITRUST L.J. 815, 816 (1968). See also Buxbaum, *supra* note 2, at 362 & n.70; N.Y. Times, May 9, 1965, at 36, col. 1. For a specific case example of the problem, see N.Y. Times, Nov. 26, 1970, at 1, col. 7, and in connection therewith, *In re Warner-Lambert Co.*, 3 TRADE REG. REP. ¶ 19,592 (Apr. 20, 1971).

power, such discretion raises serious questions of public accountability.⁹

The current state of substantive antitrust law in this country shows that the judiciary has chosen the second horn of the dilemma and accepted the risk of arbitrary enforcement practices. In the fields that count—restrictive distribution practices¹⁰ and mergers¹¹—the Supreme Court has opted for *carte blanche* to the enforcement agencies. As a result we face the problem that legitimate policies antithetical to economic-efficiency values must be assimilated as inputs to the agencies' enforcement decisions rather than faced as countervailing doctrinal challenges in the judicial development of substantive antitrust rules.¹² Thus, paradoxically, success in establishing the broadest possible substantive antitrust doctrine has sown the seeds for failure in its application.¹³ This paradox can only be resolved if we accept more significant private and judicial participation in these administrative processes, whether the agency is such in legal parlance, as in the case of the Federal Trade Commission, or seems at first glance to be a prosecuting office only, as in the case of the Antitrust Division of the Department of Justice.¹⁴ This may entail rethinking the justification of traditional administrative-law standards (which in fact developed exigently to safeguard the execution of New Deal legislative policies¹⁵), but is necessary if we are to preserve the automatic and impersonal nature of market forces, cherished by Kaysen and Turner,¹⁶ in a situation in which the executive has the right as well as the power to overrule those forces.

This Article discusses primarily one aspect of this situation: the possibility of interested third-party public involvement in the governmental decisional process which initiates or terminates antitrust enforcement proceedings. Other aspects of the overall antitrust enforcement picture are only incidentally brought into the discussion. Thus, the discussion considers intervention but is not intended as a legal analysis of the state of Rule 24.¹⁷ Similarly, consent decree settlements are discussed, but the Article does not present an analysis of problems concerning consent decrees as such; rather, it presents solely views about the interplay of public and private forces in reaching decisions to enforce the antitrust laws.

9. See generally Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777 (1971).

10. See, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

11. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

12. See Dam, *supra* note 1, at 2; Kauper, *supra* note 1, at 335; cf. Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971).

13. See Buxbaum, *supra* note 2, at 352.

14. See Elman, *supra* note 9. But see L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 60-72 (1965).

15. See generally 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 27-30 (1958).

16. See note 6 *supra* and accompanying text.

17. FED. R. CIV. P. 24.

II

PARTICIPATION IN THE AGENCY PROCESS

Third-party participation in adjudicatory proceedings before courts or agencies is normally taken as a single, irreducible thing, and accepted or rejected by reference to the magic concept of "standing." In the regulated sectors of the economy we have tended to examine the organic acts governing each sector, presumed that they define the decision-participation routine in the governmental processes relating to that sector, and concluded that in this or that industry competitors, customers, suppliers, or other more vaguely ascertainable affected groups do or do not enjoy this unitary right of participation.¹⁸ Where the right is denied, the suppliants have been deemed caught in the internal-affairs trap of *Perkins v. Lukens Steel Co.*,¹⁹ or told that competition as such is not protectable and therefore yields no standing.²⁰

However, at both the agency and judicial levels of activity, it has become increasingly apparent that this is, if not a fight on false fronts,²¹ at least a fight not so easily disposed of. Quite apart from the taxpayer doctrine,²² a growing list of expansions of the judicial standing concept testifies to increasing dissatisfaction with the traditional notions.²³ At the agency level, too, a revival of participation rights is evident; it is beginning to generalize from the fragmented, sector-by-sector rules with which we have lived during the past several decades. The recent efforts of the Federal Trade Commission to improve public participation offer strong confirmation of this growing view that there should be a right to intervene in the appropriate elements of the agency's business. Dissenting from the Commission's timid concession of limited participation rights to interested parties when voluntarily submitted merger-clearance requests are being decided,²⁴ then-Commissioner Elman stated:

The filing of an application with the Federal Trade Commission for approval of a merger is a matter of substantial public interest. Knowledge of the filing of such an application should not be restricted to 'insiders', [sic] either in the companies involved or the Commission. Why should an application for merger approval be treated differently from, say, an application to the FCC for a television station license,

18. See generally 3 K. DAVIS, *supra* note 15, at 208-94; L. JAFFE, *supra* note 14, at 501-45.

19. 310 U.S. 113, 126 (1940).

20. E.g., *Tennessee Power Co. v. TVA*, 306 U.S. 118, 137-39 (1939).

21. See, e.g., Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962).

22. See *Flast v. Cohen*, 392 U.S. 83 (1968).

23. See *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Arnold Tours, Inc. v. Camp*, 397 U.S. 315 (1970).

24. FTC Press Release (May 23, 1969); see 3 TRADE REG. REP. ¶ 9738 (1969).

or to the ICC for approval of a railroad merger, or to the CAB for certification of an air route? The essential point is that all of such applications are very much the public's business, and not merely the concern of the applicant and the particular government agency.²⁵

Important to the continued strength of this trend is a flexible approach to the details of the participation process to which an interested party should be entitled of right rather than, as the Commission would have it, of grace. In my opinion, a bundle of appropriate participation privileges must be shaped to the specific substantive and procedural parameters within which each governmental authority exercises its delegated functions. That the concept of participation should be derived from and vary with the functions performed by each governmental authority is not so unique as might be supposed from the influence that the unitary concept has enjoyed in the no-standing cases. An analogy is provided by the right-to-counsel cases; where courts have considered in detail the right to counsel provided by section 6(a) of the Administrative Procedure Act,²⁶ they have shaped the role of that counsel to the specific agency involved.²⁷

Section 5(b) of the Administrative Procedure Act,²⁸ while by its terms only applicable when specific statutes so provide, suggests a type of participation in the adjudicatory functions of an agency which can serve as a general paradigm for granting appropriate participation privileges, geared to the exigencies of each agency's functions. Section 5(b) states that an agency

shall give all interested parties opportunity (1) for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit²⁹

If we begin with such a concept, the reasonable application of which seems definable, we can safely and in a political sense responsibly urge upon the courts the double duty of extending some participation by

25. FTC Press Release (May 23, 1969), Separate Statement of Commissioner Elman 2. See also Elman, *supra* note 9; *In re Firestone Tire & Rubber Co.*, 3 TRADE REG. REP. ¶ 19,373 (Oct. 26, 1970) (allowing intervention to a student consumer-interest organization). Compare this with the earlier, cautious approach of the Commission to participation of public-interest volunteers in the relief phase of a consent order proceeding; *In re Campbell Soup Co.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,261 (1970).

26. 5 U.S.C. § 555(a) & (b) (1970).

27. See *FCC v. Schreiber*, 329 F.2d 517, 524-26 (9th Cir. 1964), *modified on other grounds*, 381 U.S. 279 (1965) (discussing nonadjudicative investigative hearings); cf. *City of San Antonio v. CAB*, 374 F.2d 326, 331-33 (D.C. Cir. 1967). There are constitutional limitations on restricting participation rights. See *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

28. 5 U.S.C. § 554(c) (1970). But see *Teamsters Local 282 v. NLRB*, 339 F.2d 795 (2d Cir. 1964).

29. 5 U.S.C. § 554(c) (1970).

third parties to most dispositive processes of government, while judiciously shaping the degree of that participation to the particular governmental function. Subject to due process limitations, one is tempted to say; yet the concept of due process itself, as applied to various types of agency proceedings and in situations at various removes from the plain taking of property, is the best possible confirmation of this relative, functional standard. In particular, this section 5(c) paradigm provides a sound conceptual framework for defining third-party participation in governmental decisions—whether by the Federal Trade Commission or the Justice Department—about antitrust enforcement. The notion that not only the Federal Trade Commission but the Department of Justice is an administrative agency is growing of acceptance when considered in the transactional context;³⁰ in that same context the applicability of the principles underlying APA section 5(b) to the Department ought to be equally acceptable, given the limitation of the statute to conduct sufficiently ordered to be called a “function,” and the limitation of “participation,” as stated, to the compatible elements of the Department’s functions.³¹

Assuming, then, the propriety of some public participation in antitrust enforcement, I propose to examine in detail the roles played by each of the antitrust agencies to determine precisely what participation is appropriate. The discussion is directed along four axes: the substantive antitrust transaction or doctrine involved; the way in which the agency’s consideration of an enforcement matter was initiated; the decision of the agency to proceed against the transaction, and especially the relationship of that decision to subsequent judicial consideration of it; and the reason for the third party’s participation. In this discussion I do not distinguish between the functions of the Antitrust Division of the Department of Justice and those of the Federal Trade Commission, because I believe that in most cases they should be treated the same. Since the role of the Department is most difficult to fit into an “agency” context, most of the discussion is centered upon it. Only where the FTC’s processes specifically differ are they considered separately; otherwise they are deemed subsumed within the discussion of the Department’s processes.

A. *Proceedings Before the Agencies*

At the outset it is necessary to draw some distinctions, because different participation rights are appropriate in different situations. First,

30. See generally Buxbaum, *supra* note 2, at 361; Dam, *supra* note 1, at 2; Posner, *supra* note 12; Sullivan, *supra* note 2.

31. See Newman, *What Agencies Are Exempt from the Administrative Procedure Act?*, 36 NOTRE DAME L. REV. 320 (1961).

we shall distinguish two types of prospective intervenors in the agency process leading to a decision whether or not to enforce the antitrust laws against a specific transaction or situation.³² The first seeks to obtain a specific remedial result, such as the maintenance of a continuing and competitive supply of natural gas;³³ the second seeks to prevent the entry of a consent decree, or at least to assure that any consent decree contains an "asphalt clause," a provision that the defendant waives the protection otherwise automatically granted by a consent decree against the use of the consent judgment as *prima facie* evidence of an antitrust violation in later private actions.³⁴ Second, we distinguish between enforcement proceedings initiated as a result of the receipt of a specific complaint from a private party and those initiated as a result of the receipt of general information, such as press reports or the report of a congressional investigation.

1. *Specific Complaints*

A decision by the Department of Justice not to proceed after the receipt of a specific private complaint ought to be open to scrutiny in two senses. First, before a decision not to proceed is made, the originally complaining party ought to be given a forum for an *ex parte* presentation of its argument or, at the least, an opportunity to submit additional documentation in support of its original complaint, because the complaint itself, by definition, was inadequate to motivate departmental action. Second, decisions not to proceed ought to be publicized and accompanied by a statement of the Department's reasons for not acting.³⁵ The customary explanation that action would not be in the pub-

32. For a discussion of the range of the concept of intervention, see Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721 (1968).

33. See, e.g., *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

34. Clayton Act § 5(a), 15 U.S.C. § 16(a) (1964); see, e.g., *United States v. Harper & Row Publishers, Inc.*, 1968 Trade Cas. ¶ 72,423 (N.D. Ill. 1967), *aff'd mem. sub nom. City of New York v. United States*, 390 U.S. 715 (1968). For a review of consent decree practice see M. GOLDBERG, *THE CONSENT DECREE: ITS FORMULATION AND USE* (1962); Flynn, *Consent Decrees in Antitrust Enforcement*, 53 IOWA L. REV. 983 (1968). For a discussion of the effort to avoid the application of the proviso of Clayton Act § 5(a), 15 U.S.C. § 16(a) (1964) to bar the *prima facie* effect of the judgment in subsequent private litigation through the waiver of the proviso by respondents (the "asphalt clause"), see McHenry, *The Asphalt Clause—A Trap for the Unwary*, 36 N.Y.U.L. REV. 1114 (1961). The effort was never very successful and has now been abandoned. However, the government seems to have the power to make inclusion a condition of its agreement to the entry of a consent decree, even if no disagreement about substantive relief remains between the original parties. See *United States v. Ward Baking Co.*, 376 U.S. 327 (1964).

35. See Note, 57 VA. L. REV. 331, 338 (1971); Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange*, 80 YALE L.J. 811, 832 (1971).

lic interest is meaningful only in an economic or legal context;³⁶ either the complaint airs a private quarrel and the challenged practice is not prevalent in an economically significant trade or number of situations, or the practice does not violate the laws as the Department understands them. A decision refusing to proceed should specify which of these objections is applicable and why. Little increase in work load would be involved, for such specification states only the minimum of information that the decisionmaker had to have in order legitimately to arrive at a decision in the first place.³⁷

These suggestions imply that a refusal to prosecute might be judicially reviewed as an abuse of discretion.³⁸ There are few cases actually mandating a prosecutor to prosecute a criminal case;³⁹ however, the general model of prosecutorial discretion is not really appropriate. While neither the criminal prosecutor nor the antitrust-agency civil prosecutor should be burdened with bagatelles, a lower threshold level for review is appropriate in the antitrust realm. Two distinctions are apparent and appealing. First, only in the antitrust field might one expect frequent significant disputes about the applicable law, and there is no apparent reason why in a case of clear error a private complainant should not be able to force the Department's hand.⁴⁰ A good example is the long delay of the Department of Justice in moving against consignment practices in the oil-distribution field, with the result that a plaintiff in a private suit eventually had to move the Supreme Court to

36. I recognize that this is one of the statutory standards that must be met before FTC action is proper. Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b) (1964). Nevertheless—and even assuming the applicability of this criterion to the Department of Justice—this is a conclusion that should be stated only with accompanying argument; it is not an explanation in itself.

37. See Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 387 n.86 (1968).

38. But see Elman, *supra* note 9, at 786; Rotunda, *The Public Interest Appellant: Limitations on the Right of Competent Parties to Settle Litigation out of Court*, 66 NW. U.L. REV. 199, 202 (1971). Both authors, although equally critical of present practices, assert the traditional view of nonreviewability of "prosecutorial discretion." To the extent, however, that they rely upon *FTC v. Universal Rundle Corp.*, 387 U.S. 244 (1967), for specific support of this position, I am not persuaded. It seems that a decision concerned with the impact upon a respondent of selective enforcement that leaves its competitors free for a time of the constraint it has suffered may properly set both higher and slightly different standards of abuse as conditions of reviewability than those properly applicable to abuses involving inaction.

39. See generally K. DAVIS, *DISCRETIONARY JUSTICE* 207-14, 225-26 (1969); Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 724 n.33 (1969). Both present a pessimistic appraisal. For a discussion of the more differentiated approach of other legal systems, see W. WEIDINGER, *DER RECHTSSCHUTZ BETROFFENER DRITTER IM KARTELLVERWALTUNGSRECHT DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFTEN* (1968).

40. This would be a particularly important corrective were the Department avowedly to pursue selective prosecution on doctrinal grounds. See Posner, *supra* note 12.

extend old doctrines to this new field.⁴¹ A second distinction lies in the differing concept of administrative flexibility involved in ordinary criminal prosecution and in antitrust actions. Criminal prosecution is exceedingly decentralized and decisions to bring or abstain from an action are highly factual and evidentiary in nature; as a result, a highly variegated pattern of prosecution develops, whose geographical component parts are able to influence each other reciprocally over time. Antitrust actions, on the other hand, are highly centralized, relatively few in number, and relatively large in individual impact; as a result, enforcement patterns can be sharply and significantly distorted without an opportunity for ongoing reactive or corrective action by other-minded actors. Therefore, even though prosecutorial enforcement decisions fall toward the "nonreviewable" end of the spectrum,⁴² the particular nature of the discretion exercised by the antitrust agencies indicates that here courts should retain the ability to review abuses that are factually gross or doctrinally erroneous.⁴³ While recent cases such as *Medical Commission for Human Rights v. SEC*⁴⁴ and *Environmental Defense Fund, Inc. v. Hardin*,⁴⁵ involving complaints against the inaction of agencies, may not be entirely apropos,⁴⁶ their refreshing willingness to

41. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); see *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969). For another example of third-party input creating new substantive law, compare *In re Cambell Soup Co.*, 3 TRADE REG. REP. ¶ 19,261 (1970) with *In re IIT Continental Baking Co.*, 3 TRADE REG. REP. ¶ 19,681 (July 2, 1971).

42. See generally Saferstein, *supra* note 37. Since I am interested in extending review of discretion to an untraditional field, I hope to be excused from participation in the Berger-Davis debate over the significance of APA § 10, Intro., sub. (2), 5 U.S.C. § 701(a) (1971). See sources cited in Berger, *Administrative Arbitrariness*, 78 YALE L.J. 965, 966 n.9 (1969). See also *Independent Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 137 (D.C. Cir. 1971).

43. The very obligation to resort publicly to resource-allocation arguments as justification for particular inaction should have a salutary chilling effect upon abuse of this argument—and sparingly used may not be an inappropriate input to the budgetary process.

44. 432 F.2d 659 (D.C. Cir. 1970), *cert. granted*, 401 U.S. 973 (1971).

45. 428 F.2d 1093 (D.C. Cir. 1970). See also *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970) (refusal of CAB to suspend proposed rates); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969) (union complaint against failure of Executive to enforce Cargo Preference Act, 10 U.S.C. § 2631 (1964)); *Safir v. Gibson*, 417 F.2d 972 (2d Cir. 1969) (failure of FMC to act to recover subsidies allegedly illegally paid plaintiff's competitors under section 810 of the Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1964)). But see *People v. Bunge Corp.*, 25 N.Y.2d 91, 302 N.Y.S.2d 785, 250 N.E.2d 204 (1969) (expressing the more traditional view of prosecutorial discretion in an agency context).

46. Indeed, the *Medical Committee* case pays lip service to prosecutorial discretion. As one commentator put it:

Recognizing that it could not compel the Commission to exercise its discretionary power in any particular way, . . . [the court] left the Commission free . . . to refuse to take any action if manpower or other considerations of resource allocation prompted such a decision.

Note, 57 VA. L. REV. 331, 342 (1968); see Note, 49 TEXAS L. REV. 322, 327 (1971).

ignore the prosecutorial-discretion shibboleth and to join issue instead on such items as standing, reviewability of discretionary actions, and ripeness can well be applied in cases testing the reviewability of Department of Justice inactivity in the antitrust enforcement field.

This type of judicial review of the rejection of specific complaints involves no risk of runaway litigation, because the level of proof required successfully to appeal from the Department's refusal to proceed would be at least as high as that required to succeed in a direct private action under section 4 of the Clayton Act.⁴⁷ It is of course true that the mere allegation of an actionable abuse of discretion can always create a significant problem of delay and a diversion of the agency's energy;⁴⁸ that, however, has always been an overkill argument, and it can be met here, as in other problem areas of agency discretion, by insisting upon high threshold levels of allegation and disposing of dubious cases through appropriate summary techniques, and by evaluating the transactional and institutional context of the specific activity against which the complaint is directed.⁴⁹ Through these means it should be feasible in time to assure that neither the complainant interested in a specific corrective act nor the one simply seeking the benefits of prior governmental action for his own later private suit gains by frivolous use of this appeal channel.

2. *Nonspecific Complaints*

In the second type of agency action that proceeds without the spur of private complaint, the different factual setting requires a different concept of the role of private intervention. Further, in this situation a differentiation based upon the nature of the practice or condition involved is important. The two most important such events will undoubtedly continue to be mergers and distribution practices. Though in both cases a specific complaint is lacking as a reference point for private reaction to the governmental decision not to proceed, the appropriate substitute reference point needed to provide a participation springboard differs for mergers and for distribution practices.

See also Leighton v. SEC, 221 F.2d 91 (D.C. Cir.), *cert. denied*, 350 U.S. 825 (1955). But even this much requires an explanation by the agency to the court and subjects that explanation to some level of approval. *See generally* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Saferstein, *supra* note 37, at 382, 395.

47. 15 U.S.C. § 16 (1964). In other words, an appellant would have to show a clear *prima facie* case of a violation of an antitrust norm, in addition to the appropriate level of abuse of discretion. Only the impact of the violation upon that appellant, a necessary component of an alternative private claim, would not be, at least theoretically, a component of his appeal from administrative inaction.

48. *See* Hahn v. Gottlieb, 430 F.2d 1243, 1248 (1st Cir. 1970). *See generally* Saferstein, *supra* note 37, at 387-88.

49. *See generally* Saferstein, *supra* note 37, at 395.

a. Mergers. Many mergers now fall within the FTC premerger scheme.⁵⁰ This procedure requires notification to the Commission within 10 days of preliminary agreement to merge and, if applicable, no less than 60 days before consummation, of essentially any asset or stock fusion in a nonregulated sector of corporations with combined total assets of more than \$250 million. The notification is a public document, although the detailed special report (requiring submission under the four-digit SIC code of branch and plant information and under the seven-digit Census product code of product sales information) is confidential and available only to other governmental agencies, specifically including the Department of Justice. The notification, of course, implies no burden on the FTC to proceed against the particular merger,⁵¹ but it might provide the means for a private party to query, and then, using the procedure outlined above, to challenge, the decision of either

50. See FTC Resolution, FTC Press Release (Apr. 13, 1969) (FTC Order of Apr. 8, 1969); FTC Letter of Explanation, FTC Press Release (July 16, 1969); FTC Resolution, 34 Fed. Reg. 7592 (1969), *as corrected*, 34 Fed. Reg. 7737 (1969). See generally O'Brien, *The Federal Trade Commission's Pre-Merger Notification Requirements*, 14 ANTITRUST BULL. 557 (1970) (primarily discussing the FTC's authority to require such notification); Reilly, *Merger Notification Program of the Federal Trade Commission*, 38 ANTITRUST L.J. 679 (1969).

51. Compare the food and cement guidelines: FTC, Enforcement Policy with Respect to Mergers in the Food Distribution Industries (Jan. 3, 1967), 1 TRADE REG. REP. ¶ 4520, at 6806 (1970); FTC, Enforcement Policy with Respect to Vertical Mergers in the Cement Industry, 1 TRADE REG. REP. ¶ 4510, at 6801 (1967). See also FTC, Enforcement Policy with Respect to Product Extension Mergers in Grocery Products Manufacturing, 1 TRADE REG. REP. ¶ 4530, at 6808 (1968); FTC, Enforcement Policy with Respect to Mergers in the Textile Mills Products Industry, 1 TRADE REG. REP. ¶ 4540, at 6814 (1968). For an analysis of the utility of these guidelines see Note, 5 COLUM. J. LAW & SOC. PROB. 137 (Aug. 1969).

Like the premerger notification announcements, these guidelines also use absolute monetary standards as the primary factor distinguishing presumptively good from presumptively bad mergers. This precedent plus the explicit promise to proceed against mergers in the top financial category indicate that the FTC will in the future allocate its enforcement resources to this top group of mergers. What is worrisome about this is the implication that smaller mergers generally will not be pursued *sua sponte*. I believe this to be a poor guideline in the horizontal merger field and, to some degree, in the vertical merger field. Not only are such standards unjustifiable under substantive antimerger law doctrine, but they overlook the danger residing in the hundreds of specialty-market situations which fall below the \$250 million-in-assets test. These niches and crannies of highly industrialized capitalism do not deserve this *de facto* immunity. Compare the Merger Guidelines of the Department of Justice, 1 TRADE REG. REP. ¶ 4430, at 6681-89 (1968), which employ relative market-share determinants. They are, of course, far too general and innocent of relevant market-definitional criteria to be predictively useful [see Committee Meetings, 37 ANTITRUST L.J. 876, 879, 892 (1969) (comments of Prof. Areeda)], but at least they avoid the defect of absolute size standards.

The examples of other countries are instructive. The British act, its Australian and Canadian progeny, and the German law all provide for premerger notification requirements and utilize percentage-of-relevant-market criteria in their guidelines. See generally III OECD, MARKET POWER AND THE LAW (1970). Such a formula, of course, is more vague and difficult to comply with than an absolute figure, but if the FTC can

the FTC or the Department of Justice⁵² not to proceed against the merger.

It might at first glance seem desirable to impose an obligation to publicize a reasoned decision to let a merger event go unchallenged upon at least the FTC and, if its internal consideration of a merger for possible action should prove to be dispositive—and discoverable—upon the Department of Justice as well.⁵³ From the point of view of potentially interested third parties, however, this goes farther than is necessary; it would suffice to impose that duty only when a question about the agency's intentions is raised by such a party. Additionally, to go farther might introduce by a back door the frequently discussed railroad release, or premerger clearance.⁵⁴ These clearances are highly touted by the business community as a path to certainty in this vague field of the law; it is, however, a path that is only really favored when the agency is thought to be moving in the right substantive direction.⁵⁵ At other times there is less use of premerger clearance procedures than might be expected from the way they are occasionally hailed.⁵⁶ Conversely, the enforcement agencies fear the clearances, because there is

make reference to SIC and Census codes in the premerger notification form, it could with little more work devise reasonably ascertainable structural market-occupancy standards.

52. It must be assumed that the notification procedure will not affect the normal rules of operation, which permit the first to question the merger to bring the suit. See Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 51-52, 54 & n.26 (1969); Rey craft, *Dealing with Enforcement Agencies Prior to Filing of Suit*, 39 ANTITRUST L.J. 174, 175 (1970); Panel Discussion, 39 ANTITRUST L.J. 211-12 (1970). The mechanics of that traditional accommodation may have to be amended slightly, but that is a minor problem—and indeed, the specific reference to the Department of Justice as an agency entitled to the Special Report filings suggests that the jurisdictional issue has been resolved by the Department and the Commission. See *id.* at 161 (comment of Commissioner Elman). Unfortunately, I am advised, the Department does not request the reports as a matter of practice, and thus still fails to obtain the benefits of this source of information.

53. The FTC system now provides that all dispositions of voluntary premerger clearance submissions together with a statement of reasons, but without party identification, will be made public. FTC Press Release (Aug. 6, 1969) (detailing the system first announced in FTC Press Release (May 23, 1969)); see 3 TRADE REG. REP. ¶ 9738 (1969). This voluntary submission program was intended primarily for those companies subject to FTC clearance for further acquisitions under outstanding FTC orders. See Wall St. J., May 26, 1969, at 5, col. 1 (Pac. ed.). It does not apply to the premerger notification procedures discussed in note 50 *supra* and accompanying text.

See also SEC Securities Exchange Act Release No. 5098, [Current Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,921 (1970) (discussing the new SEC policy of publishing interpretative opinions and no-action letters).

54. See note 53 *supra*.

55. See Buxbaum, *Restrictions Inherent in the Patent Monopoly*, 113 U. PA. L. REV. 633, 667 (1965).

56. See Rey craft, *supra* note 52, at 175-76; Committee Meetings, 37 ANTITRUST L.J. 886 (1968) (comment of Mr. Rey craft).

no adversary procedure for the fact-finding and contextual placement that is so essential to decisions in this field. All in all, after considering both the American and European experience with this approach, I am of the opinion that a clearance system is oversold as to its efficacy, and that frequent use of a clearance system is unacceptably risky to the long-range enforcement process.

Furthermore, it seems to me that the legitimate interests of the merging firms do not require a duty on the part of the enforcement agency to state a no-challenge result, for the new notification requirement imposes no duty upon the enterprises concerned to abstain from proceeding with a planned fusion.⁵⁷ If, under the new notification system, notifying companies do labor under a cloud of potential legal reaction more specific and menacing than that previously facing the large company engaged in a merger transaction, then, it might be argued, it is reasonable to require that cloud to be dispelled as expeditiously as possible by the agency that created it. In fact, however, this requirement of agency action already exists; the notifying companies can force the agency to act by the simple step of beginning to proceed with the plan. True, they may be challenged, but that problem predates, and is independent of, the notification requirement. The preliminary injunction device, already available to both enforcement bodies as a means to challenge mergers, can be used no earlier in the chronology of the merger scenario now than it was before the notification requirement was promulgated. It may be argued that the present situation is different because the preliminary injunction weapon is strengthened to a significant degree by the special-report information. But the Department of Justice, through the combination of Civil Investigative Demands and preliminary injunctions, had already achieved the same potency,⁵⁸ and the FTC has achieved a similar potency, although in a slightly more fragmented form, through its victory in *FTC v. Dean Foods Co.*⁵⁹

57. The appropriate substantive doctrinal framework for this procedure is still unclear. See Archer, *Techniques of Litigating Government Merger Cases*, 39 ANTITRUST L.J. 184, 191-93 (1969); Panel Discussion, 39 ANTITRUST L.J. 211 (1969).

58. Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (1964). But see *United States v. Union Oil Co.*, 343 F.2d 29 (9th Cir. 1965).

For a recent box score of the Department's preliminary-injunction efforts, see *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066 (N.D. Ill. 1969), and more recently, *United States v. White Consol. Indus., Inc.*, 5 TRADE REG. REP. ¶ 73,487 (N.D. Ohio Feb. 24, 1971). See *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969), cert. denied, 396 U.S. 1009 (1970), for a discussion of private parties' efforts to procure preliminary injunctive relief. See also Archer, *supra* note 57, at 191-93.

59. 384 U.S. 597 (1966); see Comment, *The FTC's Power to Seek Preliminary Injunctions in Anti-Merger Cases*, 66 MICH. L. REV. 142 (1967). This system is slightly more fragmented because the *Dean Foods* case must be seen in conjunction with the reporting requirements authorized by section 6(b) of the Federal Trade Commission

In any event, reciprocity of duties, leading to the requirement that the agency clear or file, might well become all filing and no clearing. Because of the chilling effect of the preliminary injunction and the significant, if less chilling, effect of the growing tendency of courts to require completely separate operation of merged business units as a condition of denying an injunction,⁶⁰ it seems that a lesser and lesser amount of enforcement resources, as compared with earlier times, will suffice to carry the antimerger attacks.⁶¹ If this be so, it might be better for all concerned if the enforcement agencies made their decisions under no more pressure for action than that created by the occasional prodding of interested third parties proposed above.

b. Restrictive distribution practices. There is no easy way to fashion the equivalent of a notification event from which the chain of inquiry and challenge might spring for restrictive distribution arrangements, nor would it be wise to do so in view of the administrative burdens of policing such a concept. The magnitude of the number of transactions that would have to be covered, and the magnitude of the number of review transactions that would thus be imposed upon the enforcement agencies, militate against adoption of such a scheme. It would be hard to devise a better way to render an agency impotent than to drown it in this kind of review duty, as the experience of the Directorate General for Competition of the European Communities tends to demonstrate.⁶²

There is far less need for this heavy an approach in the case of such behavioral transactions than in the case of structural changes like mergers.⁶³ First, there are already many properly motivated

Act, 15 U.S.C. § 46(b) (1964). *But see* O'Brien, *supra* note 50, at 561-67, 573-74; Panel Discussion, 39 ANTITRUST L.J. 204, 211 (1970) (comments of Mr. Reycraft).

Each case of seeking a preliminary injunction, according to participating FTC officials, was a "traumatic experience" for the Commission. BNA A.T.R.R. No. 506, at B-3 (1971).

60. *See, e.g.,* United States v. Wachovia Corp., 313 F. Supp. 632 (W.D.N.C. 1970); United States v. Cities Serv. Co., 289 F. Supp. 133 (D. Mass. 1968), *appeal dismissed*, 410 F.2d 662 (1st Cir. 1969).

Archer, *supra* note 57, at 190 n.15, cites a study finding that 13 of 23 proposed banking mergers were abandoned following the Department's announced intention to object. *See also* Kestenbaum, *Potential Competition*, 38 ANTITRUST L.J. 652, 656-57 & n.15 (1969).

61. *See* Miller, *Technology, Social Change, and the Constitution*, 33 GEO. WASH. L. REV. 17, 28-30 (1964) (query whether he would not now include substantive antitrust law among the fields moved, in this case voluntarily, out of the judiciary's grasp); N.Y. Times, June 29, 1969, at 1, col. 1.

62. *See* Buxbaum, *Patent Licensing: A Case Study on Antitrust Regulation Within the European Economic Community*, 9 ANTITRUST BULL. 101, 143-44 (1964); Buxbaum, *Incomplete Federalism: Jurisdiction over Antitrust Matters in the European Economic Community*, 52 CALIF. L. REV. 56, 58 (1964).

63. *See generally* Buxbaum, *supra* note 2, at 358; Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 416 (1970).

complainants against these transactions, and these complainants have adequate means of redress. The doctrinal shifts in section 3 Clayton Act law,⁶⁴ the new learning as to class actions,⁶⁵ and the demise of the *in pari delicto* defense⁶⁶ offer those parties with legitimate complaints against restrictive distribution practices sufficient motivation and capabilities to pursue them; therefore, no changes are necessary in the noncomplainant-nonaction situation.

I am persuaded to this view by another factor. In the case of mergers, the financial and political importance of the individual event, coupled with the understandable ill ease of the enforcement agencies at social tinkering with a demonstrably efficient machine in order to reach ill-defined and seldom immediately discernible theoretical goals, make antimerger law enforcement a sometime and vulnerable thing, needing as much insulation from short-term political constraints, and encouragement from those with reason to fight, as it can possibly get. An attack upon an exclusive distribution agreement is another matter entirely. Here there is highly visible, almost tangible behavior, with visible, almost tangible effects upon ascertainable parties or groups; here it is those who argue that there is good in this evil that are the theorists;⁶⁷ and here the events are seldom important enough, nor the consequences of the government's attack serious enough, to enable significant opposition to mount against governmental enforcement efforts.⁶⁸ In short, the government's total record in the field is fairly good, and where it has lagged behind, others have had little difficulty in picking up the attack. Under these circumstances, a change in procedures for the purpose of energizing now-unmotivated potential complainants to scrutinize the government's handiwork, given the attendant enforcement costs that would be involved, seems not only unnecessary but undesirable.

C. *The Proposal Applied to Consent Decree Negotiations at the Departmental Level*

Before leaving this subject of participation in the agencies' decisional process, it may be worthwhile to apply the model established in the preceding discussion to one of the more significant institutional set-

64. 15 U.S.C. § 14 (1964); see, e.g., Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267.

65. See note 114 *infra*.

66. See *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

67. Compare, e.g., Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957) and Preston, *Restrictive Distribution Arrangements*, 30 LAW & CONTEMP. PROB. 506 (1965) with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

68. See generally Buxbaum, *supra* note 2, at 358.

tings in which enforcement possibilities are resolved: the Department of Justice's use of negotiated consent decrees. At least 70 percent of all departmental civil complaints are terminated by consent decree settlement;⁶⁹ in addition, according to a recent incumbent, a few complaints filed are at the moment of filing joined to proposed consent decrees, indicating that occasionally some negotiations leading toward consent settlement are held in the Department before complaint is filed.⁷⁰ These figures indicate the impact that a more open process would have in the entire antitrust enforcement system. In the past, departmental spokesmen have asserted on the basis of these figures that opening the process to outside participation would reduce seriously the Department's ability to mount the most effective enforcement program with the least resources.⁷¹ One could alternatively conclude that the figures indicate the importance of a public debate and of reaching a new public consensus about appropriate participation opportunities and procedures.⁷²

The participation problem revolves around one point: that at which notice of pending deliberations or negotiations is given the interested public. The current system is to wait until a proposed consent decree is filed in court and published. Then suggestions and complaints are solicited, addressed to the Department of Justice.⁷³ The decision is anticipated, statistically speaking, by the Department's public announcement of the filing of the complaint, but a third party cannot know that any specific complaint will eventually be settled by consent. Further-

69. These figures are for the decade 1950-1959. See Flynn, *Consent Decrees in Antitrust Enforcement*, 53 IOWA L. REV. 983, 986 n.8 (1969). The portion of settled cases of those pursued to some remedy and not dismissed was 87 percent. See *id.* The figure as of the mid-sixties has been stated to be about 80 percent. See Comment, *Consent Decrees and the Private Action*, 53 CALIF. L. REV. 627, 628 n.8 (1965) (reporting comment of then-Assistant Attorney General Orrick). Posner's figure for 1965-1969 is higher: 90 percent. Posner, *supra* note 63, at 375 (Table 5). See also Note, *Closing an Antitrust Loophole*, 55 VA. L. REV. 1334, 1337 (1969).

70. Zimmerman, *Procedures for Settling with the Antitrust Division*, 37 ANTITRUST L.J. 212, 216 (1968). The percentage seems to be rising again. See, e.g., Wall St. J., July 10, 1970, at 4, col. 1 (Pac. ed.).

Traditionally the Federal Trade Commission has frequently used the approach of preliminary negotiations and filing complaints and proposed consent orders. See P. WOLL, *ADMINISTRATIVE LAW—THE INFORMAL PROCESS* 117-25 (1963). Recently, however, abandonment of this approach was announced, as part of the Commission's rejuvenation. See N.Y. Times, Apr. 10, 1970, at 39, col. 1; Kennedy, *Professor Elman and the Changing Federal Trade Commission: A Comment*, 59 GEO. L.J. 861 (1971). Thus, the model proposed in the text would not be disruptive of the Commission's working style—unless the recent *Goodyear* settlement order presages a return to old habits. *In re Goodyear Tire & Rubber Co.*, 3 TRADE REG. REP. ¶ 19,522 (March 12, 1971); see II NADER ANTITRUST STUDY GROUP, *THE CLOSED ENTERPRISE SYSTEM* 809 (1971).

71. See Shapiro, *supra* note 32, at 743 & n.104.

72. See, e.g., Votaw, *Antitrust in 1914: The Climate of Opinion*, 24 ABA SEC. OF ANTITRUST L. PROCEEDINGS 14, 15 (1964).

73. 28 C.F.R. § 50.1 (1961).

more, there is no established procedure for channeling criticism at this point in the proceedings, let alone for participation, though the Department voluntarily accepts and considers all information received.

Once the governmental decision to commit resources to an event is made, it would be relatively easy to let that decision be known and allow subsequent participation through procedures such as those previously described. While it would be difficult to shape the government's deliberative processes to accommodate participation before the complaint decision is made, this is fortunately unnecessary except where the decision to sue is kept secret while settlement negotiations proceed and announced at the same time as is the decision to settle. Therefore, if participation in shaping particular settlements is desirable, the only change from present practices needed is to require that no settlement be formulated until a complaint is filed or a proposed complaint is announced.⁷⁴ Any inefficiency that this causes would be relatively insignificant because of the rarity of the particular practice.

Once the use of simultaneous announcements is precluded, third-party participation can be implemented to such degrees and along such lines as suit the particular transactions. Regulatory-agency procedures provide suitable precedent,⁷⁵ and experience with such peculiarly departmental exigencies as may exist undoubtedly can be met by further refinements.

Above all, what must be avoided is giving an illusion of participation in the decisionmaking processes when in fact agency decisions have already congealed.⁷⁶ Frustration breeds claims of illegitimacy; inordinate effort is required merely to chip at the edges of a set course of action; and if the requisite energies are collected, all-out, all-or-nothing

74. See Zimmerman, *supra* note 70, at 216 (indicating the Division's reluctance to utilize the preliminary-negotiations approach).

75. See the excellent example in Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 90 (1970). See generally Robinson, *The Making of Administrative Policy*, 118 U. PA. L. REV. 485, 515, 519 (1970).

76. See FTC Press Release (May 23, 1969), Separate Statement of Commissioner Ellman:

The public is entitled to know about such an application at the time it is filed, not later If there are comments or objections from interested third parties, we should consider them before we act, not afterwards. . . . [There] is a large difference between the status of a matter which is entirely wide open because the agency has not acted at all, and one in which the door is at least partly closed because the agency has granted "provisional" approval.

Id. at 2.

For an excellent general example, see N.Y. Times, Nov. 13, 1970, at 23, col. 1 (dispute concerning practice of delay in releasing reports under section 102 of the Environmental Policy Act of 1969, 42 U.S.C. § 4332 (Supp. 1971), which provides that "environmental impact reports" shall be available to the public as the agency review process operates, rather than after the agency decision is made).

attacks, rather than persuasion to acceptable consensus, become the rule. As a result the total, long-range correctness of decisions is diminished.

III

PUBLIC PARTICIPATION IN JUDICIAL REVIEW OF AGENCY DECISIONS

Public participation at the judicial level consists of two things: appeals from agency inaction, and participation in judicial proceedings originally brought by the Department of Justice. Since the outlines of the discussion are clear by now, I shall avoid detailed descriptions of the various modalities of participation, and instead illustrate my proposals by concentrating upon the settlement (whether by consent decree, dismissal, or after litigation) of actions brought in the courts by the Department. Two aspects of the intervention problem are relevant to this discussion: the showing needed to obtain leave to intervene, and the showing needed to obtain a spectrum of desired results after intervention is allowed.

In pursuing these issues, it is important to keep in mind that there are informal alternatives to Rule 24⁷⁷ proceedings. These alternatives are particularly important because intervention is not an all-or-nothing proposition.⁷⁸ Participation in district court consent decree deliberations, for example, is now commonplace, whether or not this participation is formally labeled intervention.⁷⁹ I assume that whatever

77. FED. R. CIV. P. 24.

78. See generally Shapiro, *supra* note 32.

79. See Handler, *The Shift from Substantive to Procedural Innovations in Anti-trust Suits*, 71 COLUM. L. REV. 1, 18 & n.92, and sources cited therein. See generally Flynn, *supra* note 69, at 1005-10; Rotunda, *supra* note 38, at 202-14; Shapiro, *supra* note 32, at 740-48.

These efforts to obtain third-party participation usually are not successful. See Handler, *supra*. Some of the failures, however, are substantive decisions in which the court has reviewed the protest against a proposed settlement and on the facts shown decided against it. For example, in *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd mem. sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968), the district court not only reviewed the objections, but as the reported opinion itself reveals, twice before had rejected proposed consent decrees after amici curiae had propounded reasoned objections to them in oral argument. *Id.* at 424. Ironically, the ground unsuccessfully advanced by the putative intervenor against the decree in the third round—fear that Blue Chip Stamp Company, rather than losing market position to newly created competition, would extend its market domination—has apparently come to pass; at least the United States recently moved to open and amend the consent decree on that ground. See Notice of Motion and Motion to Modify the Final Judgment of June 5, 1967, *United States v. Blue Chip Stamp Co.*, Civ. No. 63-1552-F (C.D. Cal., filed Oct. 28, 1970). I am advised that the motion was denied with leave to renew.

Another example, of greater public interest, is *United States v. Harper & Row Publishers, Inc.*, 1967 Trade Cas. ¶ 72,256 (N.D. Ill.), *aff'd mem. sub nom. City of New York v. United States*, 390 U.S. 715 (1968) (the *Children's Books* case). Here, after putative intervenors' argument, a significant change was made concerning availability of

the law as to formal Rule 24 intervention, the district courts informally will hear complaints and read letters protesting proposed settlements, so that the real question is what depth of presentation will be allowed. To some extent it is only a tactical question whether, with Professor Shapiro, one argues in favor of formal intervention but concedes the courts' discretion to shape the degree of actual participation to the relevant particular circumstances,⁸⁰ or one is concerned solely with the degree of participation, regardless of the label applied to the third-party participant. All in all, because the formal intervention concept subsumes a minimal guarantee of adequate, though varying, participation rights,⁸¹ the liberal granting of formal intervention requests is preferable. However, this is not the only possible way to bring about improvement, for the courts are even now somewhat amenable to informal argument, and they may well become even more amenable to such non-Rule 24 third-party participation in the future.

A. *The Scope of Intervention*

Despite some disturbing affirmances by the Supreme Court of denials of intervention,⁸² one might begin and end the inquiry into the

the government's evidence. See Archer, *The Defendant's View*, 37 ANTITRUST L.J. 837, 846-47 (1968); McSweeney, *Privileged Communications, Attorney's Work Product, Confidential Information and Availability of Governmental Investigative Files and Grand Jury Transcripts*, 38 ANTITRUST L.J. 24, 32-33 (1969). A similar result was reached in *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (S.D. Cal. 1969), *aff'd mem. sub nom.* *City of New York v. United States*, 397 U.S. 248 (1970) (the automobile pollution control case); see 307 F. Supp. at 620.

Another occasional occurrence is the full participation by objecting third parties in motions to modify consent decrees previously entered, without provision for such an occurrence having been made therein. Compare *United States v. Western Elec. Co.*, 1968 Trade Cas. ¶ 72,415 (D.N.J.), *aff'd mem. sub nom.* *Clark Walter & Sons, Inc. v. United States*, 392 U.S. 659 (1968) with *United States v. Branch River Wool Combining Co.*, 320 F. Supp. 1324 (D.R.I. 1971).

Such cases are expectable; the right to participate in the process is no guarantee of victory. Of course, the sufficiency of the fact-finding exercise that led this or that court to reject the protest or proposed change can be questioned. See text accompanying notes 120-26 *infra*.

80. Shapiro, *supra* note 32, at 757-64.

81. One important participation right is that of appeal from a defeat below, a step not available to a party enjoying, for example, only amicus curiae status. In this connection, note also the availability to the disappointed putative intervenor of a direct appeal to the Supreme Court under section 2 of the Expediting Act, 15 U.S.C. § 29 (1964). See *Missouri-Kansas Pipe Line Co. v. United States*, 108 F.2d 614 (3d Cir. 1939), *cert. denied*, 309 U.S. 687 (1940); *cf.* *United States v. California Cooperative Canneries*, 279 U.S. 553 (1929).

82. See cases cited in Handler, *supra* note 79, at 18 n.92. See also *United States v. Atlantic Richfield Co.*, 5 TRADE REG. REP. ¶ 73,460 (S.D.N.Y. 1970), *aff'd mem. sub nom.* *Bartlett v. United States*, 401 U.S. 986 (1971) (a minor case).

The Supreme Court's use of the straightforward affirmation in these direct appeals rather than dismissal for want of a substantial federal question does not indicate that

scope of Rule 24 intervention with the *El Paso* cases, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*⁸³ and *Utah Public Service Commission v. El Paso Natural Gas Co.*⁸⁴ The basic and perhaps unique point of the *Cascade* holding is that an allegation of disobedience of a higher court's mandate may be grounds for obtaining formal Rule 24 standing to intervene.⁸⁵ Even though the interests of the intervening complainants in the *El Paso* cases were no more important or legitimate than those of the customers, suppliers, and competitors whose intervention efforts in other cases routinely have been denied, the *El Paso* complainants were allowed to intervene because they alleged this particular issue. Theoretically, this allegation bears more upon the substantive result a successful intervenor might procure than upon his right to show the error in the first place. Nevertheless, here as elsewhere there is a reciprocal relation between the threshold issue of standing and the issues involved in the substantive complaint in intervention. Thus, if the prospective intervenor alleges that he intends to rely upon the agency's deviation from a prior mandate, he is apparently given formal Rule 24 standing to prove his allegation.

The mandate need not be that of the Supreme Court, nor need the issue of disobedience be so starkly put as in *El Paso*. For example, in *United States v. First National Bank & Trust Co. (Lexington Bank)*,⁸⁶ a case applying the *Cascade* holding in the consent decree context, the district court had decided the substantive monopolization issue against the government, relying erroneously, as it shortly thereafter turned out,⁸⁷ on the supposed effects of the 1966 Bank Merger Act.⁸⁸ Despite the pendency before the Supreme Court of other bank merger cases which might, and later did, result in opposite rulings,⁸⁹ and despite its own prior formal indications to the contrary, the government announced prospective abandonment of its direct appeal and requested entry of a

the general issue of the propriety of allowing intervention, as opposed to the essentially judgmental issue of allowing intervention in a particular case, has been reviewed in any meaningful sense by the Court. See R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 197 (4th ed. 1969). In one case the Court dismissed the appeal rather than affirm the judgment, but without invoking the "substantial question" formula. *Lupton Mfg. Co. v. United States*, 388 U.S. 457, *dismissing mem.* *United States v. Aluminum Co. of America*, 41 F.R.D. 342 (E.D. Mo. 1967).

83. 386 U.S. 129 (1967).

84. 395 U.S. 464 (1969).

85. These cases have been analyzed in detail by several writers. See Flynn, *supra* note 69, at 1005-10; Rotunda, *supra* note 38, at 202-14; Shapiro, *supra* note 32, at 740-48.

86. 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd mem. sub nom.* *Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968).

87. See note 89 *infra* and accompanying text.

88. 12 U.S.C. § 1828(c) (Supp. V, 1970).

89. *United States v. First City Nat'l Bank*, 386 U.S. 361 (1967). The current

final judgment settling the dispute in favor of defendants.⁹⁰ In permitting intervention in this situation the *Lexington* court significantly extended the *Cascade* doctrine. Because the intervenor alleged executive inconsistency which on its face could not be explained by reasoned distinctions between cases or even pro forma policy assertions, it was given a chance to prove the existence of an illegitimate motive.

In fact some of the language of the opinion of the district court suggests even broader intervention rights. The court declared:

If the [Supreme] Court by its decision in *Cascade* grants intervention of right to any volunteer claiming to speak for the public interest when he can convince a court that the Government might have used bad judgment in conducting or settling a lawsuit, these intervenors are well within the class entitled to intervene.⁹¹

This statement raises the possibility of intervention in all cases, whether or not the underlying action had been pending before the same or a higher court, so long as it is alleged that the government agency used "bad judgment." Presumably, the bad-judgment allegation need not be based upon a conflict with judicial pronouncements in the same or related litigation, as was the case in *Lexington Bank*, but may be demonstrated circumstantially.

The best-known illustration of a case that could have fallen under this broad version of the rule is *United States v. Western Electric Co.*,⁹² involving a challenge to certain patent-pooling practices. The case was ended by a consent decree that not only left prior activity unpunished, but more significantly, permitted retention of the fruits of the alleged illegal conduct and failed to correct an ongoing monopoly situation.⁹³ There were no prior related judicial pronouncements, and the only proof of the charges alleged against the consent decree was circumstantial: the large disparity between minimal reasonable sanctions and those acceded to by the government. Cases such as this should be within the intervention framework. In order to accomplish this, I would read *Cascade* to hold that if an allegation of some yet-to-be-analyzed abuse of discretion is made, a complainant who is otherwise entitled to intervene because of his interest in the matter,⁹⁴ ought to be permitted

state of the law is reflected in *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970).

90. 280 F. Supp. at 263.

91. *Id.*

92. 1956 Trade Cas. ¶ 68,246 (D.N.J. 1956).

93. See ANTITRUST SUBCOMM. (SUBCOMM. NO. 5) OF THE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON CONSENT DECREE PROGRAM OF THE DEPT OF JUSTICE 29-120 (Comm. Print 1959). See generally J. GOULDEN, MONOPOLY 78-103 (1968).

94. *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969), does not require even this much.

to intervene whether the impropriety alleged is a deviation from a situationally related judicial pronouncement or deviation from acceptable law enforcement results. This is no more than the adequacy-of-representation ground of the rule,⁹⁵ and the government, above all litigants, should be amenable to an intervention challenge based on these grounds.⁹⁶

It is still unclear what level of wrongful agency action in the settlement process must be alleged to justify intervention and proved to justify rejection of a proposed consent decree. *Lexington Bank* suggests that a generous level of conclusory pleading—merely alleging “bad judgment”—is acceptable.⁹⁷ A recent case involving the Federal Trade Commission, *Robertson v. FTC*,⁹⁸ suggests a standard more in keeping with the general concepts of reviewability of discretionary agency action. In that case a dissident warehouseman objected to bylaws adopted by a tobacco marketing board pursuant to an open-ended cease-and-desist order and sought review of the bylaws by the FTC and then by the court. The court held that adoption of the bylaws was part of the general compliance stage of agency action, so that the hearing procedures required in the adjudicatory stage were not applicable.⁹⁹ However, the court suggested that under section 10(e) of the Administrative Procedure Act¹⁰⁰ injunctive or declaratory relief would be available if “arbitrary and capricious” action by the FTC—the statutory standard—were alleged.¹⁰¹ Since the Department of Justice’s activity is best understood if it is considered analogous to the action of an administrative agency, the familiar “arbitrary and capricious” wording should, as a pleading, survive a motion to deny the right of intervention, particularly if the less rigorous “bad judgment” standard of *Lexington Bank* is correct.

It is more difficult to determine what facts need to be proven in order to force an agency to give a fuller justification of its settlement efforts, or if the agency fails to do so, to justify rejection of a proposed consent decree. No precise answer can be given, but some characterization and classification suggestions, buttressed by illustrations from cases, may be of use to decisionmakers confronted with this problem.

At the outset we should recognize that because of the impact that

95. FED. R. CIV. P. 24(b).

96. *But see* Handler, *supra* note 79, at 9, 21-23, 35-36.

97. 280 F. Supp. at 263.

98. 415 F.2d 49 (4th Cir. 1969).

99. 415 F.2d at 51-54.

100. 5 U.S.C. § 706 (1970):

. . . . The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

101. 415 F.2d at 55.

intervention in consent decree hearings has on the Justice Department's power to allocate enforcement resources, this must be distinguished from the typical intervention case. In the normal case the litigation continues regardless of the outcome of the intervention attempt. Intervention may reshape the direction of the litigation or the emphasis of particular items, but these are marginal problems. If a consent decree settlement is challenged, however, an overriding consideration is the danger that no settlement will be reached if intervention is allowed and the government forced to litigate. Because of the drain on enforcement resources this causes and because of the initially legitimate presumption that a responsible public agency best knows how to allocate limited resources to protect the public interest, a court must use care in urging or requiring changes in the substance of a proposed decree.¹⁰²

1. *Asphalt-Clause Intervenor*

Where a private party has no quarrel with a settlement except that it deprives him of the benefits of Clayton Act section 5(a)¹⁰³ because it does not include an asphalt clause,¹⁰⁴ he would bear such a heavy burden of persuasion that rejection of his request to intervene would for practical purposes be inevitable. In only one case might there be an exception to this general rule. If the intervenor represents that class which has suffered from the competitive restraint being challenged and the class is essentially governmental in nature,¹⁰⁵ then for several reasons the resource-allocation problem takes on entirely different aspects. First, in this situation the public interest can be equated with that of the intervenor; therefore, the Department of Justice cannot claim that a more general public is being shortchanged if the consent decree founders due to insistence upon an asphalt clause.¹⁰⁶ Second,

102. To this extent, and subject to recognition of the fact that the question of degree, not kind, is the difficult one, I can subscribe to the concerns so stridently voiced in Handler, *supra* note 79, at 17-23.

103. 15 U.S.C. § 16(a) (1964).

104. See note 34 *supra* and accompanying text.

105. See, e.g., *United States v. Harper & Row Publishers, Inc.*, 1967 Trade Cas. ¶ 72,256 (N.D. Ill. 1967), *aff'd mem. sub nom. City of New York v. United States*, 390 U.S. 715 (1968). I assume that the class action device brings the entire public-body group into the intervention complaint.

I do not include here the debated *parens patriae* actions of the state, the legitimacy of which will be determined by the Supreme Court in *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970), *cert. granted*, 401 U.S. 936 (1971), or state agency efforts to intervene in other state-agency cases. See, e.g., *City and County of San Francisco v. Chas. Pfizer & Co.*, 48 F.R.D. 105 (S.D.N.Y. 1969).

106. Even if defendants would find asphalt clauses for the benefit of public victims equally objectionable whether the beneficiaries exhausted the list of affected parties or were only a part thereof, the government's resource-allocation objection is least tenable in the former case.

Of course the anticompetitive effects of a violation may emanate beyond the first

any departmental argument that by losing the benefits of the proposed decree the intervenor is hurting himself or his class is entitled to little weight. Those who seek to intervene obviously disagree with that assessment; their governmental status should assign to their dissenting opinion the same weight as that given the Department of Justice's opinion. Third, the tax dollars that will pay for the intervenor's later private action are no less sacrosanct than the tax dollars supporting the work force of the Antitrust Division; therefore, any argument by the Department of Justice that intervention requests should be denied in order to save enforcement resources must be rejected. I realize that the laboring oar in these governmental actions is often taken by private attorneys on a contingent fee basis¹⁰⁷—indeed, the entire local government treble-damage effort is hardly feasible without this contingent fee-engendered self-interest—but the eventual recoupment is nevertheless a tax substitute for public expenditure. Furthermore, the Department's resource-allocation difficulties can be mitigated through the expedient of allowing the local agencies' attorneys to enter the original departmental lawsuit, which then can proceed as an action for both injunctive and monetary relief.¹⁰⁸ The Department of Justice staff would supervise the agencies' attorneys, but the latter, acting as special counsel for the government, would bring the original case to judgment. Then, either at once or after appellate finality, the agencies' counsel could proceed with the treble-damage aspect of the case, using the prima facie benefit of Clayton Act section 5(a).

2. *Intervenors Seeking Affirmative Relief*

The more significant objections to the settlement of pending de-

circle of victims to affect the economy more generally, but this does not strike me as a reason to reject the proposed approach, given the existing limitations on recovery by remotely injured and indirectly harmed parties. See *Billy Baxter, Inc., v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955).

107. See, e.g., CAL. BUS. & PROF. CODE § 16750 (West 1964) (allowing the Attorney General to enter into agreements with persons to prosecute antitrust actions brought on behalf of the state or an agency thereof; presumably it includes the power to conclude contingent fee arrangements). See generally Blecher, *An Effective Deterrent to "Hard Core" Violations of the Antitrust Law*, 14 U.C.L.A.L. REV. 1060 (1967).

108. Technically the two cases could be tied together through either a joinder of parties pursuant to Rule 20(a) or through intervention. While I have found no case in which the parties joined as plaintiff were governmental and private, there is no reason to bar such voluntary joinders. And, as the *Children's Books* litigation [*United States v. Harper & Row Publishers, Inc.*, 1968 Trade Cas. ¶ 72,415 (N.D. Ill. 1967), *aff'd mem. sub. nom. City of New York v. United States*, 390 U.S. 715 (1968)] shows, state and local public bodies have joined in intervention efforts which, if successful, would have resulted in a joinder of public and private bodies. Regardless of whether joinder or intervention is employed, the district court's approval is required, but this approval should be given if the United States, the plaintiff, concurs in the application.

partmental litigation come from those third parties who seek the inclusion of some form of affirmative relief in the settlement decree. The most useful classification for such objections is one based upon the distinction between a decree imposing a sanction upon past behavior and one compelling a change of structure or behavior in the future. It is tempting to think instead in terms of a structure-behavior dichotomy, but as demonstrated below,¹⁰⁹ that dichotomy offers only a loose and not always useful correlation to the more meaningful distinction suggested.

The types of intervention rights appropriate to the different types of third parties I distinguish can be sketched by considering a hypothetical case of each. In the first case, a government action is brought to end an illegal pricing conspiracy. The government proposes a consent decree forbidding the continuation of the conspiracy and fining the conspirators; in the opinion of the Department of Justice, this will adequately assure future good behavior. In the second case, after filing an antimerger complaint, the government seeks a consent decree forbidding only future mergers but continuing undisturbed a situation alleged in the complaint of that very suit to be illegal. The proposed government action in the first case achieves the major goal, ending the illegal situation. Therefore, competitors, customers, and others affected by the prior illegal behavior should not be able to challenge the action merely because it supplies no public redress for past illegal acts. In the second case, however, third parties otherwise enjoying good standing ought sometimes to be able to intervene and complain that the Department has failed to protect them from the continuing harm. The dubious argument asserted by the Department of Justice in these cases to support its settlement decrees—that resource allocation and enforcement priorities override acceptance of a continuing, illegal, harmful structure—should not foreclose further judicial inquiry.¹¹⁰ The government may still argue a type of confession and avoidance to this charge of surrender. Therefore, a proper judicial decision whether to accept the decree or not should also consider such matters as the certainty of the legal issue al-

109. See text accompanying notes 115, 116 *infra*.

110. See, e.g., the public debate over the Department of Justice's resolution of the Ling-Temco-Vought case involving the Jones-Laughlin transaction, Wall St. J., Mar. 28, 1969, at 4, col. 1 (Pac. ed.); Wall St. J., Mar. 9, 1970, at 26, col. 1 (Pac. ed.), and the LTV case involving the Okonite transaction, *United States v. Ling-Temco-Vought, Inc.*, 5 TRADE REG. REP. ¶ 73,607 (W.D. Pa. May 27, 1971). The FTC has also consented to decrees of this type. See, e.g., *Diamond Crystal Salt Co.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,027 (1969); *Litton Indus., Inc.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,828 (1969); *Marquette Cement Mfg. Co.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,888 (1969); *Burlington Indus., Inc.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,589, ¶ 18,635 (1969); *Occidental Petroleum Corp.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶¶ 18,527, 18,599 (1968). See also cases cited in Burrus & Mayne, *Developments in Antitrust During the Past Year*, 39 ANTITRUST L.J. 533, 621-22 (1970).

leged to govern;¹¹¹ the closeness of private complainants and their harm to the effects of the continuing, illegal situation;¹¹² the availability of direct private action, as under section 7 of the Clayton Act,¹¹³ and the potential use of class actions as alternatives to these intervention efforts.¹¹⁴ Generally, however, courts ought to be reasonably accessible to a third party complaining about a proposed settlement because he is the victim of uncorrected, ongoing illegality.

As these examples suggest, the basic classification corresponds to some degree to a simple structure-behavior dichotomy. There is, however, a major third category of problems which does not fit within this traditional distinction. Often the future effects of past behavior remain to do harm though the behavior is ended.¹¹⁵ For example, complaining third parties might show that continuing harm will result because a defendant, though ordered to stop receiving exclusive grantback rights from licensees, will continue to hold an illegitimately derived dominance in the market—a dominance that, through continued attraction of future ideas, will be maintained, if not strengthened.¹¹⁶ Here, too, it is reasonable to adopt a relatively open position toward allowing intervention if an appropriate level of arbitrariness in the decision to settle is alleged.

This may be slightly inconsistent with the proposal regarding

111. See, e.g., *United States v. Pan Am. World Airways, Inc.*, 193 F. Supp. 18 (S.D.N.Y. 1961), *rev'd*, 371 U.S. 296 (1963), where the government, forced to litigate by the district court's rejection of a proposed consent decree, lost in the Supreme Court on primary jurisdiction grounds. However, one cannot tell whether this legal issue was the reason for the settlement effort.

112. E.g., compare *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) with *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

113. 15 U.S.C. § 26 (1964). Allowing more intervention in merger settlements would be consonant with the emerging position of the federal courts toward private anti-merger actions. For example, if a private litigant requests that a court order divestiture to prevent some feared prospective injury, the courts would hesitate to give him this private-attorney-general status in a case like this because it involves major structural shifts. This type of litigant is therefore preferred in the scheme proposed in the text. On the other hand, the treble-damage claimant asserting harm from past mergers is less favored by that scheme, but he is more favored by the courts when litigating in his own right. Compare *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969) with *Highland Supply Corp. v. Reynolds Metals Corp.*, 327 F.2d 725 (8th Cir. 1964). See generally Day, *Private Actions Under Section 7 of the Clayton Act*, 29 ABA SEC. OF ANTITRUST LAW PROCEEDINGS 155 (1965).

114. See generally Fine, *Class Actions*, 38 ANTITRUST L.J. 710 (1969). For a discussion of the solicitation problem see *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971); Ward & Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557 (1969).

115. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).

116. See, e.g., *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949); *United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953).

asphalt-clause intervenors¹¹⁷ in that, logically, a party's inability to bring an "easy" treble-damage action for past harm differs only in degree from disabilities arising from failure to correct an ongoing economic unfairness, for a failure to make a damaged participant whole impairs his effective participation in economic life, even in the future. Nevertheless, the difference of treatment suggested above is appropriate. It is expedient to avoid automatic complaints against departmental action, and because the ordinary treble-damage complainant is already well armed for his efforts to bring such a private action, he need not be given the additional aid of the asphalt clause merely to improve further his chances to achieve that end. Today's liberal use of the class action device, judicial approval of—and even participation in—client solicitation in these cases,¹¹⁸ the availability of government files to the private plaintiff,¹¹⁹ and the constant erosion of procedural obstacles to private actions all reduce the seriousness of complaints against departmental willingness to settle without preserving the benefits of section 5(a) for private treble-damage actions. These factors justify ignoring this minor logical inconsistency in the past-future categorization.

B. *Appropriate Intervention Procedures*¹²⁰

At present the procedures utilized by courts to determine the rights

117. See text accompanying notes 103-08 *supra*.

118. See, e.g., *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 523 (S.D.N.Y. 1971). Handler's strictures against this phenomenon [see Handler, *supra* note 79, at 7-10] are not convincing. The notice mechanics as often as not work to knock out of the recovery arena—permanently, given the statute of limitations—those absent class members who fail to respond to the court's demand that they present their damage claims. See, e.g., *Neuman v. Electronic Specialty Co.*, [1969-1970 Transfer Binder] FED. SEC. L. REP. ¶ 92,591 (N.D. Ill. 1969); Comment, 38 U. CHI. L. REV. 337, 353-55 & n.91 (1971). See generally *Korn v. Franchard Corp.*, 50 F.R.D. 57, 59-60 (S.D.N.Y. 1970). The problem is to be distinguished from the tolling effects on absent members of the class action brought; see *State of Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 572 (D. Minn. 1968).

119. *United States v. Harper & Row Publishers, Inc.*, 1967 Trade Cas. ¶ 72,256 (N.D. Ill. 1967), *aff'd mem. sub nom.* *City of New York v. United States*, 390 U.S. 715 (1968). For a discussion of prior criminal actions and discovery after "no contest" pleas, see Freeman, *The Private Plaintiff's View*, 38 ANTITRUST L. REV. 827 (1968); Kramer, *Subsequent Use of the Record and Proceedings in a Criminal Case*, 38 ANTITRUST L. REV. 300 (1969) (a brief overview); McSweeney, *supra* note 79, at 31. For an interesting informal alternative, see *Washington v. American Pipe & Constr. Co.*, 41 F.R.D. 59 (S.D. Cal. 1966). See generally *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965).

The only difficult problem is the discovery of CID-derived information when the government either decides not to proceed at all or settles with a consent decree. Even here, however, the retained copies in the government's files should be available. See Decker, *The Civil Investigative Demand*, 20 ABA SEC. ANTITRUST L. PROCEEDINGS 370, 381-82 & n.58 (1962). But see 28 C.F.R. § 16.12 (Supp. 1971) (prior approval of the Attorney General required even in the case of court-ordered disclosures). In any event, the private plaintiff can seek discovery from the defendant of the items that the defendant submitted earlier to the Department in response to a CID.

120. I leave out of consideration the fact-finding possibilities inherent in the De-

of parties seeking to intervene in consent decree settlement hearings are inadequate. The formal intervention motion is often debated in a framework seemingly derived from motions for summary judgment, with affidavits and briefs substituting for substantive debate about the disparity between the minimum acceptable relief and that sought in the proposed settlement decree.¹²¹ Initially the negotiated plea is presented to the court with only so much explanation and argument as the conscience of that court may require the parties to supply. The government's objection to a proposed intervention is usually limited to pious conclusions reiterating the resource-allocation dilemma and the presumption of legitimacy attaching to decisions of duly appointed representatives of the public.¹²² These are hardly the rejoinders from which the necessary information can be derived to determine the inadequacies of the proposed consent decree or the legitimacy of the would-be intervenor's standing to object. The court should require that the government's rebuttal discuss the issue of alleged inadequate relief in appropriate detail, explaining and justifying its failure to ask for the kind of relief that the challenger suggests would be appropriate.

The following example illustrates the shortcomings in the present procedures. In a recent case, commenting on an "offer of proof" affidavit submitted by a putative intervenor under a two-day deadline imposed by the court, the judge concluded:

[I]n this case the record was so sparse at argument on the motion as to require further illumination. It appeared to be, and has proved, advisable, in the public interest, to have allowed *Nederlander* to submit its offer of proof but [because *Nederlander's* estimate of the situation is based on hypothesized violations in the future] I find the present state of the record to be adequate and complete and that no further proceedings are required.¹²³

The third-party complainant alleged in its affidavit that the proposed theater purchases, legitimate under the settlement put forward by the government, would probably foreclose competing theater exhibitors' opportunities, an allegation of the type that should have required response

partment of Justice's own third-party complaint procedure [see text accompanying note 73 *supra*] whereby notice of proposed consent decrees is published, and objectors are invited to comment, but only to the Department. The Department has at least once invited third parties to communicate directly with the court as *amici curiae*, but I believe this was done in an effort to build a record favorable to the proposed settlement. *United States v. Shubert*, 1969 Trade Cas. ¶ 72,859 (S.D.N.Y. 1969).

121. See, e.g. *Stadin v. Union Elec. Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963).

122. See ANTITRUST SUBCOMM. (SUBCOMM. NO. 5) OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., *supra* note 93; Buxbaum, *supra* note 2, at 368; Rontunda, *supra* note 38, at 225.

123. *United States v. Shubert*, 1969 Trade Cas. ¶ 72,859, at 87,228 (S.D.N.Y. 1969).

from the government on that substantive issue. Resource-allocation arguments, if justifyingly presented, might be dispositive in such a case, but they can hardly be so until the court has at least considered the legitimacy of the putative intervenor's objection and the distance between its proposed result and that of the proposed decree. In order to fulfill such a function, a court may well have to receive such information as rudimentary market description and classification data—perhaps through written documentation and counterdocumentation.¹²⁴ The point is that the process can be informal and flexible, but serious consideration must be given to the specific objections.

I do not wish to minimize the braking effect that more generous initial fact-finding procedures may have on the disposition of governmental antitrust actions. Efficiency of disposition is disfunctionally linked with reasonable openness toward third-party intervention and participation. While a small, incremental change in a proposed decree may require only minimally greater resource expenditure, and may be acceptable to a defendant within the same interest-analysis framework that led to its decision to settle with the government in the first place, a major expansion of a decree may not only be expensive in terms of agency time and effort in making the changes, but may scuttle the chance of consensual settlement itself. Yet there is little correlation between importance of the antitrust case and the ease of its resolution along this axis. A consent decree terminating an antimerger challenge by allowing the defendant to keep some of the merged entities, for example, might not survive objection by a third party, yet to reject the third-party participation on that ground is to vitiate the whole concept of public participation in discretionary decisional processes. The dilemma cannot be resolved except in the sense that courts ought to strike balances in this field generous to serious allegations, and permitting at least initial proof-procedures; the large decision to allow the unfolding of a full-blown fact-finding and law-arguing process can then be made through stage-by-stage decisions as they may become necessary. That the fear of the delay that might result from this accommodation justifies care in defining abuse of discretion goes without saying; but that fear is a factor in the balance of the judgment, not a preliminary ground for turning away justified challenges.

124. More common and less time-consuming, but also less satisfactory, is the practice of allowing variously denominated third parties (*amici curiae*, putative intervenors, objectors, etc.) to participate in a general and free-wheeling oral argument at which issues of standing and substantive grounds of objection are mixed together. See, e.g., *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970) (although in this case the court as a result of the hearing was able to identify and calendar for fuller discussion several issues left untouched by the original parties, if done to satisfy a vague feeling that a "hearing" be given by the district court to all invitees and trespassers, then at least formal offers of proof, hearing briefs, and the like should be permitted and responses to them required).

The formal requisites of discretionary intervention set forth in Rule 24¹²⁵ are not inconsistent with this approach once we recognize that to some extent both the lawsuit and the intervention thrust in consent decree litigation are outside the ordinary frame of reference postulated by the structure of Rule 24. Certainly the twin grounds governing discretionary intervention under the rule, adequacy of representation and undue delay, are not at issue here as they are in the normal case. Representation is a central issue, but inadequacy of representation is subsumed within the charge of abuse of discretion inferred by the intervenor from the alleged disparity between the proper relief and that contained in the proposed decree. Delay in the disposition of the litigation is also involved, but again not in the traditional sense. The amount of delay involved in undertaking efforts, eventually either successful or abandoned, to improve the terms of the proposed decree ought to be acceptable. The more important delay is that involved when the court is moved to accept the intervenor's charges, reject the decree, and force the Department to consider full litigation of the original complaint. Such delay, however, is not grounds for rejection of intervention under the rule; rather, it is the price which the court must find acceptable before the intervenor can be successful on the merits.

Another factor distinguishes antitrust from other litigation and justifies this emphasis on openness and flexibility in the treatment of would-be intervenors. Usually intervention is accepted because in the opinion of the tribunal the intervenor's pursuit of his personal interest is compatible with—or at least is not detrimental to—the resolution of the dispute as originally framed by the parties; the assistance of the intervening party to the tribunal in achieving a proper resolution of the matter is a secondary and unnecessary benefit. In the intervention model I have sketched for antitrust litigation, however, the aims of the intervening party are secondary and not themselves a reason for permitting intervention. The primary purpose and justification of intervention in this field is the public benefit: the improvement of antitrust enforcement achieved by forcing the proposed consent decree through the screen of adversary argument.¹²⁶ Special efforts to accommodate public participation, even in this nontraditional field of administrative law, are therefore warranted.

CONCLUSION

Enforcement of the antitrust laws has become an administrative

125. FED. R. CIV. P. 24.

126. Compare the implied tort doctrine, with its increasing concern for use of the private action to assist in the implementation of certain public policies. *See, e.g., Baird v. Franklin*, 141 F.2d 238, 245 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); *Astor v. Texas Gulf Sulphur Co.*, 306 F. Supp. 1333, 1340 (S.D.N.Y. 1969).

function, and as such should be subject to those participation and review processes which are used in analogous agency situations. An appropriate though rudimentary sketch of an appropriate participation process has been attempted in this Article; as is the case with any such model the specifics are only preliminary suggestions that should be subjected to debate and refinement. The underlying theme, however, ought by now to be accepted: the argument that the agency's function will be inhibited and rendered less efficient by control is no more acceptable in the context of antitrust enforcement than it is in any other administrative context. We do not accept the argument as an a priori justification for avoidance of public scrutiny when television licenses are issued, when subsidies are administered, when truck routes are issued or withdrawn, or when roads are permitted or forbidden to run through national forests; we should not accept the assertion here either.

Private Participation in Department of Justice Antitrust Proceedings

The great bulk of federal civil antitrust suits are terminated by consent decrees.¹ A consent decree is framed as an injunctive order but lacks specific findings of fact or an admission of guilt. Once a decree gains judicial approval, however, it binds the parties to the same extent as would a fully litigated judgment.² Consent decrees are most commonly the product of confidential negotiations between the Antitrust Division of the Department of Justice and the defendants.³ Section 5(a) of the Clayton Act,⁴ while authorizing such settlements, specifically provides that they shall constitute prima facie evidence that the defendant violated the antitrust laws unless entered "before any testimony has been taken."⁵ A desire to avoid this prima facie effect

¹ See Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 375 (1970). Of the 323 civil antitrust judgments in favor of the Government during the period from 1950 to 1962, 265 or eighty-two percent were entered by consent.

An extensive antitrust program is also carried on under the auspices of the Federal Trade Commission. Posner, *supra* at 368-71, 404, 406, 408. The enforcement procedures of the Commission will not be examined here, however.

² For a thorough discussion of these and other features of consent decrees, see Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983, 983-1003 (1968). See also M. GOLDBERG, *THE CONSENT DECREE: ITS FORMULATION AND USE* (Michigan State Bureau of Business & Economic Research Occasional Paper No. 8, 1962).

³ The literature describing the nature of consent decree negotiations is copious. Especially illuminating are ANTITRUST SURCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE 10-13 (1959) [hereinafter cited as HOUSE REPORT]; Haisha, *Some Observations on the Negotiation of Antitrust Consent Decrees*, 9 ANTITR. BULL. 691 (1964); Jinkinson, *Negotiation of Consent Decrees*, 9 ANTITR. BULL. 673 (1964); Zimmerman, *Procedures for Settling with the Antitrust Division*, 37 ANTITR. L.J. 212 (1968).

⁴ 15 U.S.C. § 16(a) (1964). The statute provides:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

⁵ *Id.*

in subsequent private treble damage actions⁶ provides antitrust defendants with a major inducement to settle.⁷ A settlement also allows savings of considerable time and resources required in a full trial on the merits.⁸

Section 5(a) has had a substantial impact on the role played by courts in reviewing the adequacy of decrees.⁹ Although vested with the power to disapprove those decrees not consonant with the public interest,¹⁰ the courts have exercised this prerogative only rarely.¹¹ Their reticence primarily reflects the courts' deferral to the congressional policy determination that the consent decree option is a useful adjunct to effective antitrust law enforcement. To preserve the full benefits of this alternative, the court must avoid taking testimony concerning the defendant's alleged antitrust violations. This makes it difficult for the court to form any independent judgment concerning the adequacy or propriety of the decree. Unable to conduct an independent evaluation of the merits of a particular settlement, the court must rely on the Antitrust Division's opinion that the decree is consistent with the public interest.¹²

⁶ Private actions are authorized under the provisions of sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1970).

⁷ Lynn, *supra* note 2, at 1003; Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627, 628 (1965). See generally Symposium—*Relationship Between Government Enforcement Actions and Private Damage Actions*, 37 ANTITR. L.J. 823, 828, 839 (1968) [hereinafter cited as Symposium].

⁸ See Posner, *supra* note 1, at 374-78. The difference in time between the resolution of fully litigated contests and those settled by consent decrees is considerable. Between 1951 and 1957, for example, the average litigated case took more than fifty-nine months to try, while those settled by consent decree averaged only thirty-two months. HOUSE REPORT, *supra* note 3, at 8-10.

⁹ See Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 17-23 (1971); Comment, *Consent Decrees and the Judicial Function*, 20 CATHOLIC U.L. REV. 312 (1970).

¹⁰ See, e.g., *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Ling-Temco Vought, Inc.* 315 F. Supp. 1301 (W.D. Pa. 1970).

¹¹ There is some indication that courts are now making more searching and critical inquiries into the provisions of the consent decrees presented to them. One decree was summarily rejected by the court in *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 431 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968), while another court refused to enter a decree until the parties could demonstrate to its satisfaction that certain provisions accurately reflected congressional intent in the enactment of the antitrust laws. Compare *United States v. Ling-Temco-Vought, Inc.*, 1970 Trade Cas. 88,559 (W.D. Pa. 1970), with *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970).

¹² One authority has been reluctant to credit the typical judge even with making a good faith effort to grasp the merits of the issues raised by the consent decree before him:

At best, judicial implementation of consent decrees in most cases can only be analogized to the performance of a symbolic religious rite by a high priest, or, at

The extensive use of consent decrees has been objected to by non-parties to the litigation for a variety of reasons. Some have felt aggrieved by the loss of *prima facie* evidence entailed by the Antitrust Division's decision to settle rather than to prosecute the suit to judgment.¹³ Others have objected to particular substantive provisions of the agreement which they have felt do not adequately insulate them from recurrences of the defendant's alleged past misconduct.¹⁴ These dissatisfied parties have often attempted to press their claims by seeking to intervene in the decree ratification proceedings.¹⁵

worst, as the performance of an important public function with the machine-like logic of a chitlet dispenser.

Thus, a consent decree in an antitrust case . . . [is] submitted to and adopted by a proper judicial tribunal without explanation or understanding of the circumstances and consequences of the agreement . . .

Flynn, *supra* note 2, at 989-90. On the basis of the cases examined in this comment, this appraisal seems unduly harsh. Typically, judges have made considerable efforts to acquaint themselves with the issues raised by the decree, and they have often exhibited a markedly independent point of view from that put forward by the litigants. See cases cited note 11 *supra*.

Nevertheless, it is undoubtedly correct that courts are generally deferential to the Antitrust Division's position on controversial issues. As one court frankly acknowledged:

Of course, there should be no pretense that a district judge, confronted with situations like this one, is able to reach detailed judgments on the merits. The court in such a situation—short of compelling the trial a consent decree avoids—must proceed in some degree upon faith in the competence and integrity of government counsel.

Those supporting the decree as well as those opposed to it join in solemn assurances that the court is not viewed as a "rubber stamp" when presented with an elaborate consent decree in a complex case like this one. This leaves the reality, already acknowledged, that the court's time, talents and resources for intensive scrutiny are severely limited.

United States v. CIBA Corp., 50 F.R.D. 507, 513-14 (S.D.N.Y. 1970) (footnote omitted). The issues raised by the court's dilemma in such situations are fully aired in Handler, *supra* note 9, at 18-23; Comment, *supra* note 9, at 316, 320-23.

¹³ This type of concern motivated attempts to intervene in United States v. National Bank & Trust Co., 319 F. Supp. 930 (E.D. Pa. 1970); United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* City of New York v. United States, 397 U.S. 248 (1970); United States v. Blue Chip Stamp Co., 272 F. Supp. 452 (C.D. Cal. 1967), *aff'd per curiam sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968); United States v. Harper & Row Publishers, Inc., No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom.* City of New York v. United States, 390 U.S. 715 (1968). In each case the court denied the petition to intervene.

¹⁴ Typical cases include United States v. Simmonds Precision Prods., Inc., 319 F. Supp. 620 (S.D.N.Y. 1970); United States v. CIBA Corp., 50 F.R.D. 207 (S.D.N.Y. 1970); United States v. Aluminum Co. of America, 41 F.R.D. 342 (E.D. Mo. 1967), *aff'd per curiam sub nom.* Lupton Mfg. Co. v. United States, 388 U.S. 457 (1967).

¹⁵ Although secret consent decree negotiations do not provide a direct means for representing these points of view, objections to this procedure have been at least partly met by the adoption of a regulation by the Department of Justice providing for a thirty-day waiting period between the filing of a decree with the court and the date of entry. During

Such attempts have rarely led courts to grant a formal role in the proceedings to the potential intervenors.¹⁰ This situation exists despite a growing willingness by the courts to expand the degree and type of interest sufficient to support intervention in other areas of the law¹⁷

that time concerned parties may file comments on the decree with the Antitrust Division. The Division customarily reserves the right to withdraw the decree during this waiting period should it find any merit in these objections. The regulation provides:

(a) It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to prevent or restrain violations of the antitrust laws only after or on condition that an opportunity is afforded persons (natural or corporate) who may be affected by such judgment and who are not named as parties to the action to state comments, views or relevant allegations prior to the entry of such proposed judgment by the court.

(b) Pursuant to this policy, each proposed consent judgment shall be filed in court or otherwise made available upon request to interested persons as early as feasible but at least 30 days prior to entry by the court. Prior to entry of the judgment, or some earlier specified date, the Department of Justice will receive and consider any written comments, views or relevant allegations relating to the proposed judgment, which the Department may, in its discretion, disclose to the other parties to the action. The Department of Justice shall reserve the right (1) to withdraw or withhold its consent to the proposed judgment if the comments, views or allegations submitted disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate and (2) to object to intervention by any party not named as a party by the Government.

(c) The Assistant Attorney General in charge of the Antitrust Division may establish procedures for implementing this policy. The Attorney General may permit an exception to this policy in a specific case where extraordinary circumstances require some shorter period than 30 days or some other procedure than that stated herein, and where it is clear that the public interest in the policy hereby established is not compromised.

28 C.F.R. § 59.1 (1971). Prior to the adoption of this regulation in 1961, with but a solitary exception consent decrees presented to the court were apparently adopted as a matter of course. Handler, *supra* note 9, at 17. Since that time, however, there appear to have been a steadily increasing number of cases in which either the Antitrust Division or the court has altered the provisions of consent decrees in response to nonparty objections. See *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970) (provision added to consent decree providing additional security for employee and pension benefit funds of acquired corporation); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968) (one proposed decree withdrawn unilaterally by Government after receiving objections from nonconsenting defendants and amici curiae, another withdrawn after court refused to ratify agreement). See also *United States v. National Bank & Trust Co.*, 319 F. Supp. 930 (E.D. Pa. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 218 (1970); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968). In each of these cases impounding orders were entered in order to preserve information assembled by the Government for possible utilization in the future by treble damage claimants.

¹⁰ See cases cited notes 13-14 *supra*. See also *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). But see *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States v. First National Bank & Trust Co.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968).

¹⁷ See, e.g., *Hatton v. County Bd. of Educ.*, 422 F.2d 457 (6th Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967);

and the need of the courts for a full airing of the issues if they are to protect the public interest.¹⁸

Section I of this comment will examine the reasons for denying formal party status to potential intervenors. It will suggest that they do not present insurmountable barriers to limited, conditioned formal participation. Section II will develop the thesis that this near-uniform rejection of nonparty claims in fact conceals a sophisticated judicial experiment in limited but informal intervention.¹⁹ Through this technique the courts have accommodated the pressures against developing *prima facie* evidence while allowing nonparties to air their grievances and to benefit from a series of flexible remedies fashioned to meet their concerns. Section III will conclude with a comparison of a flexible system of *formal* intervention with the present informal system. It will be suggested that while a formal system can be constructed within the framework of existing law governing intervention, this would probably not result in any increase in the procedural rights of nonparties over those available under the informal method presently employed. However, the adoption of a formal alternative might prove to be beneficial to potential intervenors by serving to legitimize their participation in the formulation of the eventual settlement.

I. OBJECTIONS TO FORMAL INTERVENTIONS: AN OVERVIEW

In the federal antitrust context, courts have usually denied intervention to interested nonparties.²⁰ The justifications for denial fall

Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967); *cf. Norman's on the Waterfront, Inc. v. Wheatley*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606 (3d Cir. June 17, 1971).

¹⁸ See generally Handler, *supra* note 9, at 18-23; Comment, *supra* note 9.

¹⁹ FED. R. CIV. P. 24 governs intervention in federal civil litigation. The rule provides in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

²⁰ See cases cited notes 13, 15 *supra*; *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971); *United States v. General Tire & Rubber Co.*, 1970 Trade Cas. 89,462 (N.D. Ohio 1970); *United States v. Atlantic Richfield Co.*, 50 F.R.D. 369 (S.D.N.Y. 1970) *But see* *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970); *United States v. First National Bank & Trust Co.*,

into four broad categories: (1) those based on the Antitrust Division's assumed exclusive representation of the public interest in such actions, (2) those arising from the Division's right to determine the allocation of its own resources, (3) those founded on the right of the litigants to resolve their differences free from "undue delay or prejudice," and (4) those rooted in the desire to preserve a viable settlement option for the litigants. Careful analysis of these considerations reveals that they apply convincingly only to an unconditioned, all-or-nothing approach to intervention and carry far less weight when directed to carefully controlled, limited participation.

A. The Antitrust Division and the Public Interest

Courts frequently credit the Antitrust Division with pursuing a broad public purpose in its antitrust activities which, it is argued, would be impeded by the introduction of the numerous private grievances growing out of the defendant's alleged activities.²¹ The exclusivity position is based in part on the statute which entrusts the Attorney General with the conduct of antitrust litigation.²² Any intrusion

230 F. Supp. 260 (E.D. Ky 1967), *aff'd per curiam sub nom.* Central Bank & Trust Co. v. United States, 391 U.S. 469 (1968).

Cascade in particular seemed to auger an increased private participation in federal antitrust proceedings. There the Supreme Court held that objectors to a divestiture order entered below pursuant to its earlier mandate should have been allowed to intervene as of right in the proceedings before the district court. This decision, however, has only limited applicability to the consent decree context. In *Cascade* there was a prior mandate against which to measure the adequacy of the decree. Further, since the illegality of the defendant's conduct had already been determined, the intervenors were not depriving the defendant of an opportunity to obtain a settlement not probative of its guilt. Finally, the only method by which the Supreme Court could revise the terms of this settlement was by first holding that intervention had been appropriate.

None of these conditions are present in the typical consent decree situation. First, the proper standard of relief has not been previously determined by a trial on the merits. Second, any probing of the merits of a controversy by taking testimony limits the opportunity for settlement because it would give the decree evidentiary weight in subsequent private actions. Finally, should the court be persuaded that the applicant's complaint has merit, it need not grant intervention to protect this interest, but instead may merely refuse to approve the decree until the particular deficiency is corrected.

²¹ See, e.g., *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 693 (1961); *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954). See also Letter from Asst. Att'y Gen. Donald F. Turner to Rep. Emanuel Celler, in *BNA Antitr. & Trade Reg. Rep.*, Mar. 21, 1967, at X-1, X-3 [hereinafter cited as *Turner Letter*].

²² 15 U.S.C. § 4 (1964) provides in relevant part:

[I]t shall be the duty of the several United States attorneys, . . . under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such [antitrust] violations.

This statute has even been used to buttress a denial of intervention designed to secure enforcement of a decree already entered. *United States v. Western Electric Co.*, 1968 *Trade Cas.* 85,280-81 (D.N.J. 1968), *aff'd per curiam sub nom.* *Clark Walter & Sons v. United*

by nonparties is viewed as fettering the Attorney General's discretion. Private interests, it is asserted, are provided an adequate forum for their grievances in private actions.²³

These arguments assume that protection of private interests is generally unrelated to protection of the public good or that a court granting intervention would not be able to restrict private party participation to those issues which are related to the public good. Such pessimism is not warranted either by rule 24 of the Federal Rules of Civil Procedure or by developing antitrust case law. Any negotiated consent decree raises only a limited number of issues which the Anti-trust Division has already determined to be harmful to the public interest. Rule 24(a) insures that once a party is admitted to the proceedings, inquiry beyond the scope of those issues can be barred unless the intervenor can show that his interest is of public concern and inadequately protected by the decree.²⁴

Further, an examination of the cases in which intervention has been sought reveals that those instances in which the applicant advances a considerable number of private interests in opposition to the decree are relatively rare.²⁵ In *United States v. Ling-Temco-Vought, Inc.*²⁶ (L-T-V), for example, employees and pensioners of the illegally acquired company voiced the fear that their benefit trust funds were inadequately secured against predatory raids by the acquiring conglomerate. The district court shared their concern and fashioned a

States, 392 U.S. 657 (1968). But this argument seems to prove too much, since the Attorney General's control of the litigation is already conditioned by considerations of public policy, and whether a particular intervenor is raising a meritorious objection to a decree cannot be decided without letting him present his case. Cf. *New Jersey Communications Corp. v. AT&T*, 1968 Trade Cas. 85,445, 85,447 (S.D.N.Y. 1967).

²³ See, e.g., *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141 (1944). See also authorities cited note 21 *supra*.

²⁴ A similar protection against an excessive number of parties intervening under rule 24(b) is provided by the requirement that interventions under that provision shall not cause "undue delay or prejudice" to the adjudication of the rights of existing litigants. But see *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), *on remand*, 291 F. Supp. 3, 33 (D. Utah 1968) (twenty-six parties allowed to intervene), *vacated and remanded sub nom. Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 34 (1969).

²⁵ Typical cases in which the intervenor's objections were narrowly defined include *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970) (challenging only provision of decree allowing piecemeal divestiture); *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970) (seeking additional protection for employee and pensioner trust funds); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970) (opposing merger because of possible impairment of contracts with one of merging firms).

²⁶ 315 F. Supp. 1301 (W.D. Pa. 1970).

protective order designed to insure that these trusts would not be diverted from their intended purposes pending divestiture.²⁷

Two points about this case are noteworthy. First, the court had no difficulty in deciding that the employees' and pensioners' concern over possible misuses of their trust funds was "an element of public concern" which merited "judicial protection as long as jurisdiction remains here."²⁸ Thus, it is apparent that the protection of at least some private interests remains an important element of the broader public interests, which are sometimes inadvertently overlooked by the Antitrust Division. This demonstrates that nonparties have a valuable informational function to play in the consent decree process, a fact recognized both by the Division itself²⁹ and by courts.³⁰

The second significant feature of the *L-T-V* case is that accommodation of the objecting parties did not require the court to elevate the objectors to the formal status of parties on a par with the Attorney General. The protective order was fashioned by the court without formally admitting representatives of the employees and pensioners to the proceedings.³¹ It is difficult, however, to see how the claim to exclusive representation was furthered by preventing these groups from acquiring the status of parties. The court's inquiry does not appear to have been circumscribed by their exclusion,³² nor does it appear that granting leave to intervene would have altered the course of the proceedings. Though relegated to an informal status, the employees and pensioners were able to present their grievances fully and to receive appropriate relief; and there is no reason to suppose that any additional procedural rights of formal party status would have been exercised had intervention been granted. Thus, the Attorney General's control of the litigation would have been compromised to an equal

²⁷ *Id.* at 1309-10. The court's order appears at 1970 Trade Cas. 88,871 (W.D. Pa. 1970).

²⁸ 315 F. Supp. at 1310.

²⁹ Turner Letter, *supra* note 21, at X-2.

³⁰ See, e.g., *United States v. CIBA Corp.*, 50 F.R.D. 507, 514 (S.D.N.Y. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 618-19 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 218 (1970) (by implication); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432, 434 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

³¹ The benefited parties had made their concerns known to the presiding judge by letter, whereafter he had acted on his own motion to secure the funds in question. 315 F. Supp. at 1309-10.

³² While recognizing the right of the parties to terminate their dispute by a mutually agreeable settlement, the trial judge stated that he was "nevertheless not relieved from examining . . . and inquiring into any matter which in equity should have been considered had the matter proceeded in adversary fashion." *Id.* at 1309 (emphasis added). It is hard to conceive of a broader scope of investigation than this.

extent in either case. Such a compromise is an inevitable consequence of the court's realization that the exclusivity claim cannot always be maintained.³³

B. The Antitrust Division's Right to Control Its Resources

A second group of reasons often given for denying intervention stems from the Antitrust Division's need to employ its own scarce resources in what it considers to be the optimally effective fashion. It is argued that this goal cannot be achieved unless the Division is free to negotiate settlements whenever it feels that such a course would promote a more efficient and effective antitrust enforcement program³⁴ and that the presence of additional parties would narrow the Government's litigation options to dismissal or full trial.³⁵

This line of reasoning turns on the twofold assumption that antitrust enforcement primarily through consent decrees is optimally productive

³³ The exclusivity position was also undermined by the Supreme Court's recent decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). There, pursuant to an earlier Supreme Court mandate, the Antitrust Division had negotiated a divestiture order with the defendant El Paso which the majority of the Court viewed as threatening "to perpetuate rather than terminate this unlawful merger." *Id.* at 141. Advocates of a more stringent decree had been refused intervention below, and the Supreme Court held that denial to be error. The objections these parties had raised were "part of the public interest in a competitive system" and lay "at the heart of our mandate." *Id.* at 135. The Division, the Court found, had "knuckled under" to El Paso and had "fallen far short of representing . . . [the intervenors'] interests." *Id.* at 136-41. The Court ordered *de novo* proceedings to fashion a new decree and granted these applicants full party status.

Cascade is an extraordinary case, especially when one considers that the Supreme Court in effect accused the Department of Justice of negotiating a settlement which violated the Court's earlier mandate. While such a flagrant abuse is unlikely in the consent decree context, *Cascade* suggests that where the Antitrust Division has arguably misconceived some element of public concern, a court would be justified in granting some form of participation to a nonparty in order to secure a more balanced appraisal of that issue.

³⁴ Turner Letter, *supra* note 21, at X-2 to X-3; Symposium, *supra* note 7, at 860-61.

³⁵ See Defendants' Joint Response to Applications for Leave to Intervene at 8, 16 [hereinafter cited as Defendants' Brief] and Response of the Plaintiff to Applications for Intervention at 16-18 [hereinafter cited as Plaintiff's Brief], filed in connection with applications to intervene in *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967) *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968). In Turner Letter, *supra* note 21, the problem was phrased in this manner:

[T]he very process of formal intervention, if that is held to carry with it the full rights of the usual litigant to present evidence and to appeal, would threaten to eliminate one of the major motivating factors that leads both the Government and the defendants to attempt to work out an appropriate decree, since intervention would force on the Government and defendants at least some of the burdens of litigation that both, for diverse reasons, have sought to avoid.

Id. at X-3 (emphasis added). The qualifications in Mr. Turner's thoughtful statement point out that the thrust of the Division's objections to intervention would be blunted if the procedural rights given intervenors could be carefully controlled.

and that an intervenor would automatically acquire the right to block any settlement not acceptable to it and thus occasion an undue expenditure of governmental resources. A judicial challenge to the first assumption would be tantamount to usurpation of legislative and executive policy-making functions. Consequently, there is a strong rationale for courts not to interfere in this area.³⁰ The second assumption is, however, much easier to challenge. It is difficult to see how any objections that an intervenor might have to a particular consent decree could prevent the court from entering the decree as an independent agreement binding solely on the signatories—the Government and the defendants.³⁷

In one case in which this situation seems to have arisen, *United States v. Simmonds Precision Products, Inc.*,³⁸ the issue was decided against the intervenor. There intervention in a divestiture proceeding was granted as of right under rule 24(a)(2) for the stated purpose of "opposing the entry of a final judgment on consent"³⁹ After oral argument and an evidentiary hearing, the court overruled all of the intervenor's objections and entered the decree as originally submitted by the Government and the defendant.⁴⁰ If the intervenor had the right to block the judgment by withholding his consent to the decree, he chose not to exercise it, a highly improbable result considering the court's adverse ruling on the merits. A more likely explanation is simply that formal participation as a party to the proceedings does not give the intervenor discretionary authority to block the decree. The consent of the intervenor is irrelevant.

Simmonds suggests, therefore, that the critical issue is not whether a potential intervenor should be made a formal party, but rather what degree of participation should be accorded to such an applicant.

³⁰ This position is not based on a claim that an antitrust defendant has a right to settle his dispute with the Antitrust Division. Compare *United States v. Brunswick Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis. 1962), with *United States v. Ward Baking Co.*, 1963 Trade Cas. 77,449 (M.D. Fla. 1962), *rev'd*, 376 U.S. 327 (1964). That assertion has apparently been discredited. See Comment, *supra* note 9, at 318-20. Nor does its validity depend on a claim that preservation of the settlement option is the paramount rationale underlying section 5(a). That position too would be of doubtful accuracy. See Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334, 1336-37 n.8, 1338-39 & nn.16-18 (1969). Rather, it relies only on the limited assertion that the settlement feature of section 5(a) has as one of its bases a desire to ease the Antitrust Division's enforcement burden, even at some cost to individual private plaintiffs. Of this there can be little doubt. See Note, *supra* at 1338-39 nn.16-18.

³⁷ This of course assumes that the intervenor's objections have not been found to be meritorious by the court.

³⁸ 319 F. Supp. 620 (S.D.N.Y. 1970).

³⁹ *Id.*

⁴⁰ *Id.* at 621-23.

C. The Litigants' Right to an Expeditious Resolution of the Controversy

A customary reason for denying intervention in antitrust cases is that participation by intervenors would "unduly delay or prejudice" the resolution of the controversy between the litigants.⁴¹ Such pronouncements should be taken lightly, however, since a close reading of the cases in which these statements appear reveals that the applicant for intervention has usually been heard extensively as an amicus.⁴² Thus, delay and prejudice attributable to additional litigation is not appreciably shortened by the denial of intervention. The arguments of a party and of an amicus consume equal time. Moreover, the denial of intervention is typically coupled with a decision on the merits of the intervenor's claim and, where the court has upheld the claim, the granting of some measure of relief.⁴³ In *United States v. Blue Chip Stamp Co.*,⁴⁴ for example, the court denied intervention, remarking that the potential intervenors had "fail[ed] to raise any additional arguments not already heard at length and denied by this court" and characterizing their objections to the decree as "so shallow as to be devoid of merit."⁴⁵ Yet even such a blanket rejection required the expenditure of the court's time for adequate evaluation. In fact, the court's involvement in negotiations had stretched over eleven months and had resulted in the rejection of two earlier decrees. During this period the applicants for intervention had been heard extensively as amici.

The import of such cases as *Blue Chip* is that a fair amount of "delay and prejudice" will be tolerated by the court before it is found to be "undue." Consequently, the party or nonparty status of the potential

⁴¹ Such characterizations are typically made with the intention of disqualifying the intervenor from permissive intervention under rule 21(b). See, e.g., *United States v. CIBA Corp.*, 50 F.R.D. 507, 511 (S.D.N.Y. 1970); *United States v. Automobile Mfg. Ass'n*, 307 F. Supp. 617, 619-20 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 218 (1970).

⁴² See, e.g., *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Automobile Mfg. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 218 (1970).

⁴³ See, e.g., *United States v. National Bank & Trust Co.*, 319 F. Supp. 930 (E.D. Pa. 1970); *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970); *United States v. Automobile Mfg. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 218 (1970); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 715 (1968).

⁴⁴ 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

⁴⁵ 272 F. Supp. at 440-41.

intervenor is not the determinative factor. Rather, it is the ability of the court to condition party status appropriately in order to make it conducive to prompt but effective inquiry into the underlying controversy.

D. The Desire to Preserve a Viable Settlement Option

Central to the courts' concern with permitting nonparties to intervene in consent decree proceedings is a desire to maintain the viability of the settlement option. Intervenor could pose two distinct threats to this process. First, they might request the right to be represented at bargaining sessions between the Antitrust Division and the defendant. Second, they might seek to institute discovery procedures to gain access to the Division's evidence of the defendant's antitrust violations.

Were the intervenor to succeed in either of these requests, the utility of the settlement for the defendant would be greatly diminished. Consent decree negotiations involve many sensitive matters which defendants do not want revealed to outside parties. A defendant who believed that such information would be disclosed to third parties would not readily enter into discussions with the Antitrust Division. Even more importantly, granting discovery rights to an intervenor would almost certainly lead to an attempt to introduce testimony regarding the defendant's past antitrust violations. Such testimony would make any judgment subsequently entered available to private treble damage claimants as *prima facie* evidence of the defendant's guilt and would destroy one of the defendant's primary incentives to submit to consent agreements.

The ease with which these difficulties can be avoided varies. First, intervention might be granted without allowing any participation in bargaining discussions or by limiting such participation to permit disclosure of sensitive information only to the Antitrust Division.⁴⁶ Control of discovery presents a more difficult problem. If an intervenor is granted party status for the purpose of arguing a particular claim, and if that charge cannot be investigated adequately without resort to discovery procedures, it is difficult to envision how such privileges can properly be withheld. This dilemma has undoubtedly contributed to the reluctance of courts to confer party status on would-be intervenors. In federal civil actions discovery rights are conditioned on such status.⁴⁷

⁴⁶ Intervention for the purposes of participating in bargaining discussions has been denied in the past. HOUSE REPORT, *supra* note 3, at 25; M. GOLDBERG, *supra* note 2, at 68-69.

⁴⁷ For example, FED. R. CIV. P. 26 (governing the taking of depositions), FED. R. CIV. P. 33 (governing the serving of interrogatories), and FED. R. CIV. P. 34 (governing the discovery and production of documents) all are available only to "any party" to the action.

Possibly feeling that extensive procedural rights would be both inevitable and undesirable, the courts have pretermitted the issue by denying intervention altogether.

Nevertheless, many applicants for intervention can make a colorable showing of a claim to some measure of relief. Certainly, past victims of the defendant's alleged wrongs have a right to request effective protection against future antitrust violations.⁴⁸ Likewise, those disadvantaged by the deprivation of prima facie evidence of the defendant's guilt entailed by entry of a consent decree can point to a primary, if not paramount, purpose of Section 5(a)—a desire to facilitate the prosecution of the claims of private litigants—as a reason for carefully reviewing the Antitrust Division's settlement decision.⁴⁹

The practical problem thus becomes one of fashioning the means for allowing the court to ventilate whatever objections are raised to the decree and to grant whatever relief is required while continuing to preserve a viable settlement option for the litigants. Two competing alternatives for accomplishing this objective present themselves: (1) a system of informal participation and consultation and (2) a system of formal but stringently conditioned intervention. Both approaches have been utilized, although the former is by far the more common. Each merits consideration in more detail.

II. INFORMAL RESOLUTION OF NONPARTY OBJECTIONS

One problem constantly facing the court in the consent decree context is how to develop an adequate understanding of the underlying issues without destroying the utility of the settlement by transgressing the statutory prohibition on taking testimony. The most commonly adopted method for achieving this objective is *amicus curiae* appearances,⁵⁰ although on occasion less formal submissions, such as

⁴⁸ The injunctive relief sought by the Government is intended to restrain the supposed prior antitrust violations of the defendant. Consent decrees which fall short of that goal have arguably failed in their major purpose and should not be entered by the court until revised.

⁴⁹ The argument that the overriding purpose in enacting section 5(a) was to aid private treble damage claimants is ably made in Note, *supra* note 36, at 1338-39 nn.16-18.

⁵⁰ See, e.g., *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968).

Although amici have traditionally been viewed as neutral participants in the proceedings, a marked shift to a more partisan role in recent years has been noted. See generally Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

letters addressed to the court, have proved sufficient.⁵¹ Neither the Antitrust Division⁵² nor the defendant⁵³ normally opposes a motion by third parties to appear before the court in an informal, information-dispensing capacity. This level of participation serves to focus the attention of the trial judge on the critical provisions of the consent decree and does not risk impairing future settlement possibilities.

Once this knowledge is acquired, the court has considerable discretion to refashion the eventual settlement along lines it regards as consonant with the public interest. This power stems from the court's authority to reject those decrees which it feels inadequately protect legitimate elements of public concern. The court's views, if forcefully expressed, will almost inevitably be adopted in the final decree since they will be interpreted by the litigants as foreshadowing the court's position on the merits were the case to be tried.⁵⁴

Significantly, the court's influence does not depend on the status of the person objecting to the proposed settlement. It should not be surprising, therefore, to find that whether a potential intervenor is admitted as a party is completely independent of whether it is granted relief.⁵⁵ Courts are able to protect the concerns of both parties and nonparties with equal vigor. The mechanics of this process are best understood by examining the judicial response to the two broad classes of problems typically raised by applicants for intervention: (1) requests to obtain evidence of the defendant's alleged past antitrust violations and (2) requests for protection against recurrences of the defendant's alleged illegal activities.

⁵¹ *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970).

⁵² Plaintiff's Brief, *supra* note 35, at 19; Turner Letter, *supra* note 21, at X-2.

⁵³ Defendants' Brief, *supra* note 35, at 6.

⁵⁴ *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968), is illustrative of this process. The decree eventually entered in that case was the third brought forward by the parties—the first having been unilaterally withdrawn by the Government in response to the objections of amici and the second vetoed by the court.

⁵⁵ Intervention denied, relief denied: *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968). Intervention denied, relief granted: *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968). Intervention granted, relief denied: *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970); *United States v. First National Bank & Trust Co.*, 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968). Intervention granted, relief granted: *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

A. Evidence of Past Harms: Discovery Without Intervention

A large percentage of petitions to intervene result from a desire to secure the benefit of a favorable judgment litigated by the Government.⁵⁹ These applicants directly challenge the administrative decision to settle the suit, arguing that the deprivation of evidence entailed by a settlement materially impairs the prosecution of their private treble damage actions.

This type of claim is illustrated by *United States v. Automobile Manufacturers Association*,⁵⁷ in which the defendant association together with the "big four" auto manufacturers were charged with conspiracy to eliminate competition in the production of motor vehicle air pollution control equipment. It was alleged that this scheme was furthered by another conspiracy involving collusive bidding for the purchase of patents and patent rights covering such equipment. The consent decree, filed after eight months of negotiations, was opposed by numerous state and local governmental units either as amici or as petitioners to intervene. All but one member of the latter group were treble damage claimants in pending civil actions. The court recognized that their main objective in seeking to intervene was the prevention of a settlement not probative of the defendants' guilt.⁵⁸

The court denied all motions to intervene, rejecting the applicants' requests on multiple grounds. Initially, it noted that "the decision to settle an antitrust case in this fashion, like the decision to commence it in the first place, is an administrative decision and . . . [a]s such, it is not subject to review by this court."⁵⁹ Continuing, the court analyzed the terms of the decree and found that the Government had obtained substantially all the injunctive relief which would have been warranted by a successful trial on the merits.⁶⁰ Returning to the applicants' assertion that, notwithstanding this fact, approval of the settlement should be withheld, the court stated:

It has been urged that the decree adversely affects the rights of treble damage claimants in the prosecution of their own claims. But . . . [w]e know of no authority . . . which would require the Gov-

⁵⁹ Since *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), four of the seven instances of attempted intervention in the proceedings held prior to entry of consent decrees have raised this issue. Compilation from 1967-71 'Trade Cas.

⁵⁷ 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom. City of New York v. United States*, 397 U.S. 248 (1970).

⁵⁸ 307 F. Supp. at 619-20.

⁵⁹ *Id.* at 620.

⁶⁰ *Id.* at 621.

ernment to prosecute this case to judgment solely for the purpose aiding treble damage claimants.⁶¹

While the court's observation is undoubtedly correct, a decision to deny treble damage claimants relief entirely is made particularly difficult by the existence of strong competing equities demanding a high degree of governmental attentiveness to the concerns of injured parties. Arguably, when the inferior resources of a private litigant make successful prosecution of an otherwise valid claim virtually impossible in the absence of presumptive evidence of guilt, a consent decree settlement is tantamount to rejection of one of the underlying rationales of section 5(a)—the facilitation of private antitrust law enforcement.⁶²

The courts are aware of this difficulty, however, and the *Auto Manufacturers* case illustrates an alternative which partially reconciles the Government's interest in reaching a settlement with the nonparty's interest in obtaining evidence of the defendant's guilt, yet at the same time avoids the development of testimony and the consequent prima facie presumption of guilt. An extensive grand jury investigation of the defendants' alleged antitrust violations had preceded the Government's civil suit. While the jury was dismissed before it returned any indictments, it heard numerous witnesses and assembled "a tremendous amount of evidentiary material"⁶³ which was clearly of value to private claimants. Although nonparties were denied intervention in the Government's subsequent civil suit, the court ordered this material, as well as the transcript of the grand jury proceedings, to be impounded by the Department of Justice and directed that it be made available to treble damage claimants upon a showing of good cause.⁶⁴ Through this arrangement the court was able to provide a considerable measure of relief to private plaintiffs who, as a result of the consent decree, were not given presumptive evidence of the defendants' guilt.

Similarly, in *United States v. Harper & Row Publishers, Inc.*,⁶⁵ the trial court was again presented with the opportunity to adopt a compromise measure. That case involved an alleged conspiracy to fix prices on certain lines of books, particularly textbooks involved in large sale orders to government instrumentalities. As in the *Auto Manufacturers*

⁶¹ *Id.*

⁶² See note 36 *supra*.

⁶³ 307 F. Supp. at 620.

⁶⁴ *Id.*

⁶⁵ No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968). Since much of the material referred to here is relatively inaccessible, citations will be more extensive than would be the case were the references to a reported opinion.

litigation, a grand jury investigation had preceded the filing of the Government's complaint. According to one potential intervenor's tart phrasing of the issue:

[S]ubstantial quantities of documents had been produced by defendants, many of which were relevant and material to the unlawful price fixing conspiracy alleged in the pending treble damage actions. The danger exists that such documents will be turned back to the defendants upon entry of the consent judgements in this case and that such documents will be destroyed, suppressed or lost.⁶⁰

The relief requested was impounding of the documents in a central depository until appropriate orders to produce them had been entered by the various trial courts before which treble damage actions were pending.⁶⁷ The defendants objected to this procedure, arguing that the movant should be relegated to its remedies through ordinary discovery procedures.⁶⁸ The Government, on the other hand, felt that extensive disclosure was proper. It desired to exempt only those papers which might be classified as the work product of the Antitrust Division or subject to the informant's privilege.⁶⁹

While denying all motions to intervene, the trial court did enter a separate order impounding all documents in the possession of the Antitrust Division—including those belonging to nonparties—very much as the applicants had requested.⁷⁰ Thus, the court's actions assured the continued existence of this body of material but left the complicated questions of the discoverability and admissibility of various documents for resolution by the appropriate trial forum. By adopting this approach it also managed to avoid being forced into a resolution of factual questions bearing on the culpability of the defendants, thereby preserving the integrity of the eventual consent decree settlement.

⁶⁰ Record at 200; Memorandum in Support of Application to Intervene on Behalf of the School District of Philadelphia, *et al.* at 2 [hereinafter cited as Memorandum].

⁶⁷ Record at 210; Memorandum, *supra* note 66, at 18.

⁶⁸ Record at 170-71; Defendants' Brief, *supra* note 35, at 29-30.

⁶⁹ Record at 263-64; Plaintiff's Brief, *supra* note 35, at 19-20.

⁷⁰ Record at 302-03. The order reads in relevant part:

The United States of America, plaintiff herein, having made an investigation which resulted in the filing of . . . [these] civil injunction cases; and it appearing that numerous treble damage actions based in large part on the same facts as alleged in these civil injunctive actions have been and may be filed . . . ; that motions have been or may be made in these treble damage actions for the production of documents . . . presently in the possession of plaintiff; and that it is in the public interest that these documents be identifiable and preserved and remain together for possible use in these treble damage actions.

IT IS ORDERED, ADJUDGED AND DECREED that all documents procured by process or otherwise by the plaintiff from any individual, partnership, firm, or corporation during its investigation . . . , but not internal memoranda or work product of plaintiff have been impounded . . . until further order

The utilization of a streamlined discovery procedure at a future date as a substitute for formal intervention in the consent decree proceeding is typical of the flexible approach presently followed by courts in the antitrust area. Moreover, the informal status of the entity granted relief has not affected the courts' willingness and ability to fashion a remedy. Indeed, only in *United States v. National Bank & Trust Co.*⁷¹ did the trial judge pause to reflect on the unusual situation presented by an impounding order issuing at the behest of nonparties. But his hesitation was only momentary. The Government raised no objection, and it was "clear that the court can enter such an order without granting intervention."⁷² The court cited only one authority for this pronouncement—the *Auto Manufacturers* litigation.

B. Assumed Facts and the "No Testimony" Limitation

An interest in amassing evidence of a defendant's past violations of the antitrust laws is only one instance of the desire by nonparties to secure what they view as a full measure of relief. Nonparties also attempt to intervene to question the adequacy of the decree's substantive provisions. Such challenges present the court with two interrelated questions: (1) what limits to place on its own investigations in order to avoid giving the consent decree evidentiary weight in a subsequent action and (2) how to prevent undue delay in or prejudice to the adjudication of the rights of the litigants.

In an attempt to resolve such controversies fairly, courts have resorted to a number of procedural devices designed to produce a thorough examination of the issues without impairing the utility of the consent decree for the parties. These informal methods deserve a more detailed examination of their merits.

1. *Limited Inquiry into Prospective Conduct.* Occasionally, challenges directed to the substantive provisions of a decree can be settled on a policy level without introducing evidence in support of the charges made. This situation arises when the intervenor's complaint is directed primarily at the failure of the settlement to anticipate and interdict some allegedly wrongful future activity of the defendant. A striking example of this occurred in connection with *United States v. Harper & Row Publishers, Inc.*,⁷³ discussed above, in which one applicant for intervention proposed a change in the substantive terms of the decree relating to the defendants' practice of publishing books in two editions, denominated "library" and "trade." The library

⁷¹ 319 F. Supp. 930 (E.D. Pa. 1970).

⁷² *Id.* at 933.

⁷³ No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968).

editions were supposedly of a higher-quality binding and thus better able to withstand heavy use than were the corresponding trade editions. In the extensive hearing held prior to entry of the consent decree, however, the applicant alleged that there was no difference in quality between these supposedly distinct versions and that the existing price differential was established and maintained pursuant to a price-fixing conspiracy among the defendants.⁷⁴ The sellers of the defendants' books were accused of aiding in this conspiracy by fraudulently denying that they had the less expensive volume in stock in order to induce purchases of the higher-priced edition.⁷⁵ It was further alleged that while it was economically feasible to produce both library and trade editions, the defendants might nevertheless decide out of "malice or spite" to discontinue the less expensive trade edition.⁷⁶ The potential intervenor's chief concern was that the consent decree as framed did not specifically reach these practices. It argued that unless they were specifically condemned, the investigatory powers given the Anti-trust Division in the decree would not be deemed to cover them,⁷⁷ the court would be unable to punish them through contempt proceedings,⁷⁸ and attempts to modify the decree to obtain the supplemental relief necessary to curb these practices would founder.⁷⁹

⁷⁴ See Transcript of Proceedings, Nov. 16, 1967, at 33-38 [hereinafter cited as Nov. 16 Proceedings].

⁷⁵ *Id.* at 16-18, 30.

⁷⁶ *Id.* at 41-42.

⁷⁷ The Division's powers to police settlements are restricted by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14 (1970), to those matters deemed "relevant" to violations of the consent decree. *Id.* § 1312(a). The question of relevance is often fiercely contested, with the erstwhile defendant obviously adopting a very restrictive view and, by and large, being sustained in its contention by the courts. Flynn, *supra* note 2, at 996-97. Moreover, the recent case of *United States v. Armour & Co.*, 91 S. Ct. 580 (1971), poses additional problems for the Division. Its decision that consent decrees should be narrowly construed would make it difficult to sustain an argument that certain conduct not explicitly condemned in the decree should nevertheless be deemed unlawful by implication.

⁷⁸ While the power of a court to punish consent decree violations through contempt proceedings is unquestioned, this power has seldom been utilized. There are three interlocking reasons for this. First, the Division practically never initiates contempt proceedings. Professor Posner reports that since the inception of the antitrust laws, the Government has instituted criminal contempt proceedings on only twenty-two occasions and has been successful in only twelve of these instances. Posner, *supra* note 1, at 387 (Table 16). Professor Goldberg, writing in 1962, could find only thirty-nine instances of contempt proceedings brought in connection with antitrust consent decrees since 1890. M. Goldberg, *supra* note 2, at 66. Another commentator could discover only three such efforts in the period from 1960 to 1969. Note, *supra* note 36, at 1344. Thus, at most a total of forty-two attempts to punish decree violations through contempt proceedings have been made in approximately eighty years.

Second, nonparties to the litigation have traditionally been held to lack standing to initiate contempt actions. See, e.g., *United States v. ASCAP*, 341 F.2d 1003 (2d Cir. 1965), *cert. denied*, 382 U.S. 877 (1965); *United States v. Western Electric Co.*, 1968 Trade Cas.

The defendants denied that any of these practices had ever existed or were contemplated, but the trial judge dismissed their protestations of innocence as irrelevant to the issue confronting him. Desiring to avoid an inquiry into the defendants' past activities, the court nevertheless wanted to insure the prospective effectiveness of the decree.⁸⁰

The trial judge's method of achieving this goal was quite novel. Although no changes were made in the text of the decree, a number of understandings were arrived at between the defendants and the court which the latter likened to legislative history.⁸¹ First, defendants' counsel stipulated that they were willing to interpret the scope of the consent decree to permit investigations by the Antitrust Division to detect misrepresentations of the type of books in stock. It was further agreed that if such investigations disclosed these proscribed practices, the defendants would not oppose, on procedural grounds, a modification of the decree to prohibit them explicitly.⁸² The court indicated its

85,279 (D.N.J. 1968), *aff'd per curiam sub nom. Clark Walter & Sons v. United States*, 392 U.S. 657 (1968). While one recent commentator has criticized this doctrine, his proposal to vest nonparties with limited enforcement powers has not yet been accepted. *See generally* Comment, *Antitrust Consent Decrees: A Proposal to Enlist Private Plaintiffs in Enforcement Efforts*, 54 CORNELL L. REV. 763 (1969).

Finally, this lack of eligible and enthusiastic advocates for contempt sanctions coalesces with the court's traditional ignorance of the factual underpinnings of the consent decree to create an understandable reluctance on its part to exercise its contempt power. In litigated cases or in those instances in which the court has had the benefit of an informal discussion of the issues before entry of the decree, this factor would not be a problem. Generally, however, neither method of fact resolution has been utilized before ratification of the decree, and consequently the court is not able to decide whether a particular course of conduct violates the decree. *Compare* *United States v. Western Electric Co.*, 1968 Trade Cas. 85,279 (D.N.J. 1968), *aff'd per curiam sub nom. Clark Walter & Sons v. United States*, 392 U.S. 657 (1968) (apparently rejecting intervenor's literal interpretation of decree provision, under which the defendant would be in contempt, in favor of parties' construction of document, on the theory that their knowledge of its terms exceeds that of applicant), *with* *United States v. R. L. Polk & Co.*, 1969 Trade Cas. 87,730, 87,733 (E.D. Mich. 1969) (sustaining criminal and civil contempt charges and granting supplemental relief), *vacated and remanded on other grounds*, 438 F.2d 377 (6th Cir. 1971).

⁷⁹ Consent decrees are not easily modified, by either the Government or the defendant, although it is possible that Government attempts are governed by a more liberal standard. *See generally* Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 YALE L.J. 1391, 1392-97 (1959); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967). *Compare* *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), *with* *United States v. United Shoe Machinery Corp.*, 391 U.S. 244-49 (1968).

⁸⁰ Nov. 16 Proceedings, *supra* note 75, at 7-9.

⁸¹ *Id.* at 45.

⁸² *Id.* at 25-26, 55. In many respects this was the most controversial of the claims raised by the intervenors. Apparently the parties felt that this particular practice was not only not prohibited by the consent decree but was also not reached by the Government's complaint. The defendants maintained that the alleged business practice, while reprehensible and indeed fraudulent, did not constitute a violation of the antitrust laws. Hence they were prepared to oppose modification on substantive grounds. *Id.* at 26.

willingness to do "everything that [it] could to protect . . . against that."⁸³ The judge further stated that differential prices on qualitatively identical items and economically unjustified decisions by the defendants to cease publication of certain types of books would be deemed violations of the decree and punished by contempt sanctions.⁸⁴ With this gloss, the decree provided substantial protection to all major interests raised by the applicants. The "unsuccessful" intervenors were also given an auxiliary role in policing this ban by virtue of an express provision of the decree giving them substantial rights of access to evidence of postdecree violations accumulated by the Division.⁸⁵

Thus, a flexible, informal resolution of the nonparty's concerns was achieved without delving into the defendants' past behavior. By confining the discussion to hypothetical future conditions, no factual controversy was permitted to develop. The question naturally arises whether a similar method can be developed to deal with objections to the decree which are more directly related to the defendant's prior conduct.

2. *Limited Inquiry into Past Conduct.* An intervenor's challenge to a consent decree is often based on a claim that the Antitrust Division is seeking less relief than is required by the public interest. The options available to the court in such a situation depend to a large extent on whether the Division disagrees either with the potential intervenor's assessment of the underlying facts or with its choice and application of the relevant substantive legal standards. If the former,

⁸³ *Id.* at 31.

⁸⁴ With respect to the alleged price fixing conspiracy, the following exchange occurred:

MR. NEWBURG [attorney for intervenors]: What I am saying is the bookstore buys the same book at a discount and it is called a trade edition. The very same edition is sold to the library at net price and it is labeled library edition, so . . . while there is no difference in cost . . . very often the very same identical physical book is sold at different prices

THE COURT: All right. If you can establish that you would have no trouble getting violation of this consent decree.

Id. at 37-38. With respect to economically irrational decisions to cease publication, the court was equally direct:

THE COURT: [I]f I thought for a single moment that the curtailment of the publication of . . . trade editions was motivated by any desire to arrest the public bodies or to deprive them of getting a product that they were entitled to get by virtue of unstilled competition, or if cessation of the publications was out of a mode of revenge or personal satisfaction, I wouldn't hesitate a moment to do something about it.

Id. at 62-63. The court went on to say:

With that understanding I don't think there could be any dispute by anybody about what motivates the Court's willingness to accept . . . this consent decree.

Id. at 64 (emphasis added).

⁸⁵ The decree eventually entered in *Harper & Row* is reported at 1967 Trade Cas. 84,552 (N.D. Ill. 1967). The provision allowing certain intervenors access to evidence of post-decree violations is incorporated in paragraph X of that decree. *Id.* at 84,555.

the pressure to receive testimony becomes intense; but if the latter, the difficulty may be avoided by transforming the issue into one of formulating a proper rule of law on the basis of certain assumed, but not established, factual conditions.

The transformation of a potential factual dispute into a question of law is illustrated by *United States v. Minnesota Mining & Manufacturing Co.*⁸⁰ (3-M). The applicant for intervention in that case argued that the defendant's alleged past patent abuses had been so flagrant that a provision of the consent decree requiring the defendant to grant licenses on a nondiscriminatory, reasonable-royalty basis was insufficient. Dedication of the offending patents was suggested as the appropriate measure of relief.⁸⁷ In responding to this assertion, the Antitrust Division did not terminate consideration of this claim by opposing intervention.⁸⁸ Instead, it engaged in a frank discussion of the bargaining that had gone into the fashioning of the decree. It admitted that royalty-free licenses were often insisted on in similar cases⁸⁹ but pointed to what it considered to be fully adequate substitutes for that relief which were already incorporated into the decree, such as a requirement that 3-M disclose certain important manufacturing processes.⁹⁰ After receiving briefs and hearing oral arguments on these matters, the court denied the applicant any relief.⁹¹

It is important to note that in the 3-M case the court was able to decide the issues in conflict between the Antitrust Division and the unsuccessful applicant without having to resolve factual questions. Once the Division conceded that dedication or its equivalent was the appropriate measure of relief, the court could accept the applicant's representations about the defendant's prior conduct as true for purposes of argument. Freed from the possibility of having to hear evidence or testimony on this issue, it could deal solely with the narrow legal question of whether the relief provided by the consent decree was an adequate substitute for the dedication requested by the applicant for intervention.

A far more difficult problem would have been presented if the potential intervenor and the Antitrust Division had not agreed on the nature

⁸⁰ No. 66 C 627 (N.D. Ill., Sept. 2, 1969).

⁸⁷ See Motion of Polychrome Corporation to Intervene at 2-12; Memorandum of Law in Support of the Motion of Polychrome Corporation to Intervene at 1-3, 6-9.

⁸⁸ The general position of the Government was set out in Transcript of Proceedings, Sept. 2, 1969, at 17-46. While the Government did claim that intervention was inappropriate under existing case law, its discussion of this point was quite perfunctory. *Id.* at 41-46.

⁸⁹ *Id.* at 34-35.

⁹⁰ *Id.* at 17-38, especially 34-38.

⁹¹ *Id.* at 56.

of the defendant's allegedly culpable conduct. Under such circumstances the court finds itself in an almost impossible dilemma. On one hand, it does not seem that such a controversy can be resolved intelligently by the court without a rather detailed inquiry into the defendant's past activities. Yet these are the very matters whose official factual resolution the consent decree is designed to avoid.

Although there are no cases involving intervention which clearly illustrate this problem, similar conflicts have arisen in other consent decree contexts. The techniques employed in those cases are suggestive of those which could be applied in situations in which applicants for intervention disagree with the Division's presentation of the facts. *United States v. Standard Oil Co.*⁹² represents perhaps the most ingenious attempt to resolve this problem. The difficulty in that case arose between the Antitrust Division and the defendants rather than between parties and nonparties. The Government's complaint, filed in 1950, had requested that certain allegedly monopolistic practices of the defendants be remedied by divestiture. The complicated negotiations which followed lasted eight years and finally deadlocked on this point. It appeared that the issue would have to be set for a full trial, and, anxious to avoid this possibility, the trial judge suggested an alternative approach. His basic strategem was to have the parties present their views and relevant background information on the defendants' business practices as if the issue of framing appropriate relief were before the court. The stricture against receiving testimony was to be avoided by having the requested showing made only through statements by counsel. The culpability of the defendants prior to the filing of the complaint was assumed for purposes of argument. On the basis of these "hypothetical" premises, the question to be decided was whether changed market conditions in the eight years since that time had made divestiture an inequitable remedy.

The court received "written statements, presentations and oral arguments" from both parties. The Government generally conceded the accuracy of the defendants' presentation of postcomplaint data "as far as it went" but proceeded to introduce its own evidence of current market conditions. On the basis of this hearing, the court indicated that the Antitrust Division had not sustained the burden of showing divestiture to be appropriate. Since it was virtually certain to lose this point on the merits, the Division withdrew its demand in subsequent conferences and a mutually agreeable settlement was consummated.⁹³

A full-scale evidentiary dispute was avoided in *Standard Oil* when the

⁹² 1959 Trade Cas. 75,522 (S.D. Cal. 1959).

⁹³ *Id.* at 75,526-27.

Division, faced with the court's adverse interpretation of the facts, conceded the validity of the defendants' claim. It seems clear, however, that the court was made aware of material whose formal recognition would have jeopardized the inadmissible character of the consent decree in subsequent private actions.⁹⁴ Thus, the court was able to express its opinion with regard to the merits without engaging in formal fact finding.

While the negotiations in *Standard Oil* were facilitated by the parties' informal acquiescence in the court's view of the case, a formal agreement between them can have serious consequences. *Gurwitz v. Singer*⁹⁵ is enlightening in this respect. In a prior federal antitrust action, the defendants had stipulated that they had engaged in Sherman Act violations and permitted the court in that action to "make findings of fact and conclusions of law on the basis of the foregoing admissions."⁹⁶ These stipulations went on to provide, however, that such admissions were made "for the purpose of [the federal] . . . action only" and were not to be given any weight in any subsequent proceedings.⁹⁷ Despite this disclaimer, the court held that the earlier consent judgment was available to private plaintiffs for evidentiary purposes. It found a "clear distinction" between consent decrees agreed to by the parties and judgments entered on the basis of stipulated facts and held that only the former were exempted from having a prima facie effect in subsequent treble damage actions.⁹⁸

Any difference between the stipulated facts in the prior proceeding in *Gurwitz* and the hypothetical facts adduced in framing the decree in *Standard Oil* seems due more to the artfulness of counsel than to any defensible substantive distinction. In each instance the court was presented with the litigants' own view of the true state of affairs, and in each case its analysis of these data led directly to the parties' eventual

⁹⁴ The question of just what conditions must be satisfied before a consent decree will be given evidentiary weight is undecided. One might expect that the statutory restriction on the taking of testimony refers only to evidence relating to the defendant's alleged antitrust violations. Presumably, the rationale which explains the failure to give collateral estoppel effect to consent decrees is that such issues have never been officially resolved. The disputed facts in *Standard Oil*, however, were not of this character. Rather, they dealt with postcomplaint activities of the defendant. These were scrutinized less with the intent of proving continuing antitrust violations than of demonstrating the failure of past anticompetitive effects to dissipate over time. Nevertheless, one authority has suggested that *Standard Oil* "violates the spirit," if not the letter, of section 5(a). Flynn, *supra* note 2, at 991 n.31.

⁹⁵ 218 F. Supp. 686 (S.D. Cal. 1963).

⁹⁶ *Id.* at 686-87.

⁹⁷ *Id.* at 687.

⁹⁸ *Id.* at 689.

settlement. Yet the *Gurwitz* case sharply emphasizes one limitation of the *Standard Oil* approach to resolving factual disputes. The court's attempt to effect an agreement between the parties must be confined to an informal, advisory opinion which, although indicating the court's view of the case were it to be litigated, does not result in a formal stipulation of the facts. By adopting the informal procedure employed in *Standard Oil*, it would be possible both to investigate the defendant's past conduct with a considerable degree of thoroughness and to preserve a viable settlement option for the litigants. Such a procedure could be expected to lead to the formulation of sounder decrees initially and to the possibility of subjecting them to more intelligent interpretation, modification, and enforcement in the future.

Standard Oil also serves to highlight another limitation of the court's inquiry if the settlement option is to be preserved. If the data submitted by the disputants, including the potential intervenor, are conflicting and the parties cannot reconcile their differences, the court must either elect to accept one point of view more or less on faith⁹⁹ or else conduct a full hearing designed to uncover the actual state of affairs. Adopting the latter alternative would clearly remove any subsequent decree from the no-evidence exemption,¹⁰⁰ while opting for the former

⁹⁹ This alternative has apparently been adopted on several occasions. For example, in *United States v. Paramount Pictures, Inc.*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,526 (S.D.N.Y. Mar. 22, 1971), the consent decree obligated the court to examine purchases of theaters by the defendant to insure that they were not anticompetitive. A particular transaction was challenged by a competitor of the defendant, who alleged that the defendant had entered into a series of secret agreements with the next largest theater chain in the area. It was alleged that these arrangements were designed to reduce competition between these two parties and that as a consequence of the purchase in question, the defendant would actually have a far larger share of the market than appeared on the surface. The objecting party sought to compel production of these alleged secret documents. The court denied this request, stating:

The state of the record is insufficient to warrant the discovery [the objecting party] seeks. The court, under the circumstances, accepts the sworn statement of petitioner's General Attorney for Production Matters whose affidavit submitted upon these proceedings states unequivocally that there is no [such] agreement, written or oral, express or implied . . .

Id. at 90,179. Similarly, in *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970), one applicant for intervention sought to "conduct discovery proceedings to further develop the basic facts and the impact of the proposed merger." *Id.* at 511. But such measures were unwarranted, the court said, since the intervenor "proceeds mostly upon predictions, rumor and speculation rather than upon direct and visible injury to itself . . ." *Id.* at 513.

¹⁰⁰ The taking of testimony prior to entering a decree will allow the decree to be utilized by private plaintiffs for evidentiary purposes. *Soblosky v. Paramount Film Distributing Corp.*, 137 F. Supp. 929 (E.D. Pa. 1955); *De Luxe Theatre Corp. v. Balaban & Katz Corp.*, 95 F. Supp. 933 (N.D. Ill. 1951). This is true even if the decree recites on its face that no testimony has been taken and that no admission of liability has been made.

would entail different results depending on whose viewpoint the court accepted. A decision to side with the potential intervenor might result in the defendant withdrawing its consent to the decree. A decision against the potential intervenor might result in the court resolving an issue against the nonlitigant without giving him the opportunity to establish his view of the facts.

These results are mitigated by two factors, however. First, the unsuccessful applicant can establish his claim to additional relief in a separate private action. Thus, denial of intervention and ratification of the Division's position is not so much a defeat for the applicant on the merits as it is a relegation to a different forum.¹⁰¹ Second, denial of intervention as of right is itself appealable.¹⁰² In antitrust cases this appeal, in order to establish the "inadequacy of representation" of the applicant's interests below, invariably includes a detailed cataloguing of the supposedly repugnant features of the settlement. This procedure clearly has the effect of bringing the merits of the consent decree before the reviewing court; and while the propriety of the decree is not technically at issue on such an appeal, it appears that in litigated cases the appellate court's decision on such matters has influenced its decision on the appropriateness of intervention.¹⁰³ It is the Antitrust Division's contention, apparently accepted by one lower court, that a similar result applies to consent decree settlements:

Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 157 F. Supp. 251 (N.D.N.Y. 1957), *aff'd*, 263 F.2d 533 (2d Cir. 1959), *cert. denied*, 360 U.S. 912 (1959).

¹⁰¹ No collateral estoppel effect results from Government settlements. The ability of private parties to maintain their separate actions is, as a matter of law, unimpaired by such a decision. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689-90 (1961); *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954).

Nor would a potential treble damage claimant necessarily be more effective in obtaining relief as a *practical* matter (the test for intervention under rule 24) as a party to the Government's suit than he would in a private action. He would not be able to force the defendant to enter into a settlement, and a full trial of his claims would result in a greater total expenditure of judicial and governmental resources than if he had maintained a separate action.

¹⁰² This means that in effect all denials of intervention are appealable since any potential intervenor can merely append a claim for intervention "as of right" to his petition for permissive intervention and, if unsuccessful, take a single appeal from the trial court's ruling. This distinction in appealability under the two branches of rule 24 has been most effectively criticized in Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 748-51, 760 (1968).

¹⁰³ See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), *on remand*, 291 F. Supp. 3 (D. Utah 1968), *vacated and remanded sub nom. Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969). See also *United States v. First National Bank & Trust Co.*, 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968) (allowing intervention in part because of prior Supreme Court decision on merits arguably contrary to Government's settlement position).

If the applicants were permitted to intervene, they could of course appeal from erroneous decisions on the law or facts. *The same effect can be achieved by an appeal from a denial of intervention.* If the [subsequent] decision by the District Court [on the merits] is erroneous, then the denial of intervention . . . as a practical matter impaired or impeded the ability of the applicant to protect his interest.¹⁰⁴

This position considerably oversimplifies the difficulties facing an unsuccessful applicant since it assumes that the applicant will have been able to build an adequate record below to sustain its appeal even though not allowed to establish its view of the facts. Nevertheless, this statement contains an important grain of truth. By now enough antitrust intervention cases exist to support the applicant's right to a very full airing of objections to a consent decree.¹⁰⁵ The failure of a district court to follow the informal intervention procedure could well lead a reviewing court to hold the trial court's refusal to be an abuse of discretion.

Therefore, it appears that informal practices now employed in the lower federal courts afford concerned nonparties a considerable role in the fashioning of consent decrees. They are able to direct successful challenges to substantive shortcomings of these decrees and, in effect, to take appeals from adverse rulings—all while remaining technically outside of the litigation.

III. FORMAL INTERVENTION: HOW REALISTIC AN ALTERNATIVE?

This comment has developed the thesis that ostensibly unsuccessful applicants for intervention in federal antitrust cases are in reality given those procedural rights necessary to air their claims effectively and receive the measure of relief dictated by the merits of their grievances. Whether this informal accommodation of the interests of nonparties can be transformed into an equally effective system of formal intervention remains to be answered.

Two recent articles commenting on the strengths and weaknesses of the present rule 24 have concluded that the rule as presently drafted

¹⁰⁴ *United States v. ASCAP*, 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,492, at 90,012 (S.D.N.Y. Jan. 29, 1971) (quoting with approval from a Government memorandum submitted in opposition to motions to intervene).

¹⁰⁵ See, e.g., *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620 (S.D.N.Y. 1970); *United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970); *United States v. CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968); *United States v. Harper & Row Publishers, Inc.*, No. 67 C 612 (N.D. Ill., Nov. 27, 1967), *aff'd per curiam sub nom. City of New York v. United States*, 390 U.S. 715 (1968).

affords an opportunity for extensively conditioning the participatory rights given to intervenors.¹⁰⁶ The remarks of Professor Shapiro on this point are particularly insightful:

When one is granted intervention, either as of right or in the exercise of discretion, it does not necessarily follow that he must be granted all the rights of a party at the trial and appellate levels, including full rights of discovery and cross-examination, the ability to veto a settlement of the case, and the right to appeal from a final decision. It is both feasible and desirable to break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all.¹⁰⁷

Professor Shapiro's suggestion, at least in the federal antitrust setting, explicitly acknowledges the real nature of the present informal practice of handling objections to consent decrees—a flexible but stringently conditioned form of intervention. The procedural rights now granted to nonparties under this informal system could not be expected to change significantly were they given formal party status since the basic pressures which have fashioned the limitations on these rights would be unaltered. Nevertheless, formal recognition of the system now in effect would to some extent serve to regularize the pragmatic approach adopted by the lower federal courts in handling questions of intervention.

A step in this direction was taken recently in *United States v. Simmonds Precision Products, Inc.*,¹⁰⁸ in which the Government's suit challenged the acquisition of Liquidometer Corporation by Simmonds. At the time of the merger these two corporations and one other controlled the entire market for aircraft fuel gauging systems. Although the complaint had requested that the acquired company be divested intact as a viable enterprise, the proposed consent decree permitted a piecemeal disposal of Liquidometer. The employee's union of the acquired company sought to challenge this provision since it posed a serious threat to the job security and employment rights which had accrued to union members under their contracts with Liquidometer. It insisted that the original request for divestiture of the company as a whole should be followed.¹⁰⁹

¹⁰⁶ See generally Shapiro, *supra* note 102, especially pages 752-59. See also Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329, 366-67, 374-80 (1969).

¹⁰⁷ Shapiro, *supra* note 102, at 727.

¹⁰⁸ 319 F.Supp. 620 (S.D.N.Y. 1970).

¹⁰⁹ *Id.* at 620-21.

The court granted the union's motion to intervene under rule 24(a)(2) "for the purpose of opposing the entry of a final judgment on consent," and "an evidentiary hearing was held on the merits of the Union's opposition"¹¹⁰ The hearing revealed that after the original complaint had been filed, two groups of key management personnel had left Liquidometer to form two new competitive firms. Their success had been immediate and dramatic, so that the market now contained three thriving firms exclusive of Liquidometer and Simmonds. The court also found that, in striking contrast, Liquidometer had suffered heavy losses and that it threatened not only to go bankrupt, but to cause Simmonds to fail also.¹¹¹

The court reasoned that the Government's primary concern in bringing the suit had been the preservation of a competitive market and that changing conditions had shifted the means of attaining that goal from wholesale divestiture to piecemeal disposal of the acquired firm's assets. It decided that the union's goal of keeping Liquidometer functioning as a unit did not override the legitimate interest of the public in promoting the maximum feasible number of healthy, competitive firms in the market. Judgment against the union was rendered accordingly.¹¹²

The court's decision to grant the union's request for intervention is understandable. The impending divestiture posed a real and immediate threat to its financial well-being and no alternative forum for protecting this interest was available.¹¹³ In allowing intervention, however, the court had to face the question of what procedural rights should be granted the union after its admission. While the *Simmonds* court did not explicitly formulate the limits it placed on the union's participation, a practical solution may be suggested. The Advisory Committee's notes to the 1966 amendment of rule 24 clearly show an

¹¹⁰ *Id.*

¹¹¹ *Id.* at 621-22.

¹¹² *Id.* at 622-23.

¹¹³ *Cf. United States v. Ling-Temco-Vought, Inc.*, 315 F. Supp. 1501 (W.D. Pa. 1970), discussed in text at notes 26-35 *supra*. It is somewhat surprising that the court allowed the union to intervene as of right under rule 24(a)(2) rather than permissively under rule 24(b)(2), but there is a plausible justification for this result. Professor Shapiro recognizes a broad class of potential intervenors whose interest in the proceedings sets them apart from general members of the public but who may not have an independent legal claim against any of the parties to the litigation. Shapiro, *supra* note 102, at 736-33. Rule 24(b)(2) requires that an applicant present a "claim or defense" having a question of law or fact in common with the main action, while rule 24(a)(2) imposes no such restriction on the intervenor's interest. In *Simmonds* it is not clear that the union had a legally cognizable claim or defense against anyone, so that admitting the union "as of right" may have been the only alternative to not admitting it at all.

intent to allow restrictions to be placed on intervention under rule 24(a): "An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."¹¹⁴ Thus, the scope of the procedural rights afforded to a private intervenor in federal antitrust proceedings should be controlled by the particular problems surrounding the effective presentation and resolution of its claim.¹¹⁵

Just how such rights might be conditioned is best examined in the context of a specific situation. In *Simmonds*, for example, had the

¹¹⁴ 39 F.R.D. 69, 111 (1966).

¹¹⁵ Four major areas have been identified in which intervention as of right has traditionally differed from permissive intervention: (1) the right to an immediate appeal from a denial of intervention, (2) the standard of appellate review governing the denial of intervention, (3) the need for an independent jurisdictional base for the intervenor's claim, and (4) the procedural rights conferred by the grant of intervention. Kennedy, *supra* note 106, at 334-35. Professor Kennedy suggests generally that the rationales for these distinctions have weakened over time and that they presently serve no useful purpose. *Id.* at 354-72.

The one possible exception to this development is the right to assert compulsory counterclaims or crossclaims. Professor Kennedy feels that compulsory counterclaims or crossclaims cannot be restricted where intervention is as of right but can where intervention is only permissive. *Id.* at 358. Since it appears that both branches of rule 24 may have to be utilized in order to admit deserving parties to antitrust proceedings, *see* note 113 *supra*, this distinction is of considerable importance. For example, one would certainly not want to allow private parties a right to assert their antitrust claims against the defendant if admitted to the Government's suit under rule 24(a)(2).

In addition to denying intervention altogether, two methods of avoiding this consequence without disturbing existing case law appear possible. First, through a broad interpretation of the "common question" provision of rule 24(b)(2), the court could always grant intervention at its discretion. This approach is an especially promising way to treat potential treble damage plaintiffs since it is not unreasonable to treat their claims as presenting "questions of law or fact in common" with the main action for purposes of admission to the proceedings under rule 21(b). Alternatively, where intervention is appropriate only under rule 21(a), the court could regard such crossclaims as "permissive" under rule 13(b) rather than "compulsory" under rule 13(a). Either approach would obviate the necessity of resolving private disputes ancillary to the Government's action.

A more direct approach would be to refuse to perpetuate this distinction in the consent decree context. The blurring of rules 21(a) and 21(b) in that setting is already approaching the point at which the two branches are indistinguishable. As one court noted:

Having concluded that neither movant makes out a case for intervention as a matter of right, . . . the court reaches quickly a similar decision on the alternative of permissive intervention. . . . *The critical judgment now made is that the consent decree is a proper disposition.* The prolongation of the suit has not been shown . . . to be desirable or justifiable. Absent such a showing, in an antitrust case brought by the United States, continuation of the litigation becomes by definition a course that will unduly delay or prejudice the adjudication of the rights of the original parties.

United States v. CIBA Corp., 50 F.R.D. 507, 514 (S.D.N.Y. 1970) (emphasis added). The clear import of the court's language is that formal intervention under either branch of rule 24 is equally inappropriate if the objections to the decree are found to be insubstantial. Conversely, where the nature of the applicant's claim is held to warrant allowing him to intervene, the branch of the rule employed should be equally irrelevant.

union been able to attribute Liquidometer's poor earning record to Simmonds' mismanagement of the firm, the court might well have accepted the union's contention that a divestiture of the acquired company as a functioning entity rather than piecemeal would better serve the public interest.¹¹⁶ To sustain such a charge, the union would have required access to records of the management and bookkeeping practices of the controlling corporation during the relevant period. Under such circumstances the court would probably have been faced with a challenge to the union's right to discovery of the critical documents. A restriction of the right to utilize discovery procedures beyond those required by the rules of evidence does not seem to be warranted where access to the desired information is indispensable to establishing the applicant's case. If the intervenor can establish a *prima facie* case for relief, it is difficult to justify denying it access to the records necessary to substantiate its claim.¹¹⁷ The opportunity for a full discussion of the disputed matter has been the most beneficial aspect of the informal participation system¹¹⁸ and should not be abandoned when that system is replaced by formal intervention.

Nevertheless, the pressures to avoid compromising the settlement option by allowing the indiscriminate introduction of testimony are strong. Perhaps the best possible accommodation of these conflicting interests would be to allow either the Antitrust Division or the defendant to withdraw its consent as an alternative to letting the discovery procedure go forward. Such an option would provide the parties with another opportunity to frame a settlement agreeable to all concerned and which would not constitute *prima facie* evidence of guilt. Further, it would allow a greater influence by nonparties in the formulation of consent decrees while preserving the basic features of the settlement process.¹¹⁹

¹¹⁶ The union did allege that the acquired company's losses were mere paper allocations by Simmonds of its own debts. Although this matter was settled against the union without explicit reference to actuarial records, other matters were alluded to which fully justified the court's rejection of this contention. *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620, 621-22 (S.D.N.Y. 1970).

¹¹⁷ The proper rule appears to be that framed by Professor Shapiro: "Some limitations would seem appropriate even when intervention is of right, so long as the limits imposed do not preclude effective presentation of the intervenor's interest." Shapiro, *supra* note 102, at 756 (emphasis added).

¹¹⁸ See *United States v. Minnesota Mining & Mfg. Co.*, No. 66 C 627 (N.D. Ill., Sept. 2, 1969), discussed in text at notes 86-91 *supra*; *United States v. Standard Oil Co.*, 1959 Trade Cas. 75,522 (S.D. Cal. 1959), discussed in text at notes 92-94 *supra*.

¹¹⁹ At least one other alternative is open to the court, in certain circumstances. If the issue raised by the applicant for intervention were relatively peripheral, the court might agree to enter all of the decree except the disputed portion. Such a procedure would have

Similarly, adoption of a formal intervention system establishes the existence of the right to appeal. It has been suggested that while waiver of the right to appeal could not be required as a condition to allowing intervention, standing to take an appeal is not automatically conferred by entry into the litigation.¹²⁰ It seems reasonable to suppose, however, that an appeal should be permitted once a party is admitted to the proceedings, provided the challenge is on an aspect of the decree which affects it.

This was the policy followed in *Norman's on the Waterfront, Inc. v. Wheatley*,¹²¹ in which Norman's brought a suit against the Board of Alcoholic Beverages challenging the validity of the Virgin Islands Alcoholic Beverages Fair Trade Law.¹²² Four importers and wholesalers of domestic liquors sought and were granted leave to intervene as additional parties defendant.¹²³ The court found the law void because of its conflict with section 3 of the Sherman Act¹²⁴ and entered a permanent injunction against its enforcement.¹²⁵

The Board chose not to appeal, but the four intervenors did contest the ruling. Norman's questioned their standing to bring an appeal since no declaratory or injunctive relief had been either sought or obtained against them.¹²⁶ The court of appeals brushed aside this objection, holding that "[t]he intervenor . . . has the right to appeal from all interlocutory and final orders which *affect* him.' . . . Put another way, '[o]ne who has become a party by intervention . . . is entitled, if aggrieved, to appeal.'"¹²⁷

several advantages. First, it would insure some relief immediately from the major features of the defendant's allegedly wrongful activities. Second, it would guarantee that the bulk of the decree would come within the section 5(a) no-evidence exception, irrespective of the depth of the investigation undertaken with regard to the disputed issue. Finally, it would serve to soften the litigants' resistance to outside inquiry both by restricting its compass and by minimizing its adverse effects.

¹²⁰ Shapiro, *supra* note 102, at 753-54.

¹²¹ 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606 (3d Cir. June 17, 1971).

¹²² V.I. CODE ANN. tit. 8, §§ 150-160 (Supp. 1971). The provisions of the Act were manifestly anticompetitive though arguably legal. For example, section 156 required the brand owner or his licensee to file a list of the minimum retail prices at which his liquors could be sold in the Virgin Islands and banned all sales below those figures. Sections 153 through 155 permitted a wholesaler of alcoholic beverages to enter into contracts with retailers establishing a minimum resale price for branded liquor. This price was binding even on retailers who did not sign such contracts.

¹²³ Since the court of appeals did not indicate whether these interventions were granted under rule 24(a) or rule 24(b), nothing in its opinion turned on such a distinction.

¹²⁴ 15 U.S.C. § 3 (1970).

¹²⁵ The trial court opinion is reported at 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,423 (D.V.I. Aug. 14, 1970).

¹²⁶ 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606, at 90,492; *cf.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

¹²⁷ 5 TRADE REG. REP. (1971 Trade Cas.) ¶ 73,606, at 90,492, *quoting with approval* 3B

This holding is clearly applicable in the consent decree context. It is difficult to imagine a closer analogy to the typical consent decree than an injunctive order from which neither of the original parties seeks to appeal. The sensible approach followed by the court in *Norman's* should govern review of consent decree interventions as well. Standing to appeal should be held to exist whenever the issues triggering the intervenor's participation have been decided against it.¹²⁸

Norman's and *Simmonds* could well serve as prototypes for a formal system of intervention fully capable of resolving the concerns of non-parties in a fair and expeditious fashion. Together, they suggest that the intervenor should have the procedural rights necessary to present its claim and to acquire standing to take an appeal.¹²⁹ In each instance the intervenor's presence created no untoward consequences for the litigants and led to a much fuller discussion of the critical features of the eventual decree than would have otherwise taken place. The widespread utilization of a system of conditioned formal intervention would take advantage of the possibilities for the flexible resolution of conflicts inherent in rule 24.

CONCLUSION

Lower federal courts are now experimenting with limited informal intervention in the resolution of disputes concerning federal antitrust consent decrees. The concerns of nonlitigants are fully heard and accommodated according to their merits without formally admitting them to the proceedings. The denial of formal recognition probably stems from the courts' hesitancy to confer on such applicants all of the rights conventionally thought of as accruing to a party.

The courts' concern that the limited rights now granted informally

J. MOORE, *FEDERAL PRACTICE* § 24.15 (2d ed. 1969) and 9 J. MOORE & B. WARD, *FEDERAL PRACTICE* § 203.06 (2d ed. 1969).

¹²⁸ This does not mean that such an intervenor should have the power to block entry of any settlement agreeable to the Antitrust Division, the defendants, and the court entering the decree. On the contrary, such a right should be withheld, as it apparently was in *Simmonds*, in order to avoid undue delay or prejudice to the original litigants. The ability to seek appellate review of the judgment below should serve as a sufficient protection for the intervenor's interests. See text at notes 38-40 *supra*. See also Shapiro, *supra* note 102, at 756-57 n.157.

¹²⁹ Another group of advantages possibly accruing to an intervenor are the right to seek a judicial construction, modification, or enforcement of the settlement. The typical consent decree contains a provision by which the court retains jurisdiction for these purposes, but only at the request of "any of the parties" to the judgment. Flynn, *supra* note 2, at 997 & n.48. Such privileges do not seem inevitable, however. Were they viewed as undesirable, the wording of this provision could be altered to name specifically those parties entitled to invoke the court's jurisdiction. Such rights do not attach to intervention *per se*.

could not be similarly conditioned in a formal system is unfounded. On the contrary, their power to do so is virtually beyond question.¹³⁰ Should the district courts choose to abandon their informal methods of accommodating the interests of nonparties, the general contours of the resulting formal intervention seem clear. Leave to intervene would be granted at the discretion of the court and would be limited to as narrow a substantive compass as possible. Procedural rights would be afforded as required for a full examination of the underlying controversy, including if necessary the right to discovery and compulsory process, subject in turn to the litigants' alternative right to withdraw their consent from the settlement. The power to block entry of a consent decree or other settlement agreeable to the original parties and the court would be withheld, but the right to appeal from such a judgment would be retained. Formal intervention of this kind would provide a workable framework for harmonizing the conflicting rationales of the antitrust laws—the promotion of effective private enforcement and the utilization by the Government of the most efficient means of settlement.

Robert P. Schuwerk

¹³⁰ Kennedy, *supra* note 107, at 366-67; Shapiro, *supra* note 102, at 727, 752-56.

COMMENT

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INTRODUCTION

Federal administrative agencies are under attack. Their alleged failure to perform their functions in accordance with the public interest has led to numerous proposals for reform—among them, proposals for increased public participation in agency proceedings. This Comment will consider a rather technical subject having important practical implications: the mechanisms, fashioned by statutes, administrative regulations and policies, and judicial decisions, by which groups seeking to represent or promote the public interest are permitted to participate in certain proceedings of the Federal Communications Commission (FCC), Civil Aeronautics Board (CAB), Federal Trade Commission (FTC), Atomic Energy Commission (AEC), and Federal Power Commission (FPC).

The first part of this Comment will survey recent criticism of federal administrative agencies. It will next discuss the legal basis of public participation before the agencies and its relationship to the law of standing to obtain judicial review of administrative action. It will then explore the underlying problems in constructing a regulatory model, defining the public interest and public interest groups, and determining the ideal role such groups should play within the regulatory model. It will proceed to analyze the considerations that currently shape agency discretion in permitting public interest participation in relation to the effect such participation has actually had upon agency proceedings. Finally, it will assess certain proposals to facilitate more productive public interest participation.

In the second part, the Comment will set forth the particular statutory and factual situation confronting each agency, and attempt to focus upon distinctive problems within the experience of each agency which may provide some lessons for agencies in general. The FCC discussion will examine the control third parties may exert over the determinations when to convene and whether to settle a broadcast license renewal hearing. The CAB section will focus on the structuring of public participation within a hearing itself. The FTC analysis will approach the problems of contouring and limiting public participation in informal and formal enforcement proceedings. Finally, the AEC and the FPC will be examined jointly in order to focus on their status as regulators of segments of the power industry: the highly technical nature of the subject matter and the complicated nature of the proceedings involved in power plant construction licensing occasion some concern whether public participation can be effective and, if not, whether alternative means of improving agency policymaking may be necessary.

The recent change in attitude toward public participation may be illustrated by contrasting two instances of judicial review of the treatment accorded applicants for participation in administrative proceedings. In 1955, the Court of Appeals for the District of Columbia

Circuit, in *Kansas City Power & Light Co. v. McKay*,¹ reversed a district court's grant of standing to several electric utility companies attempting to attack certain Rural Electrification Administration contracts. The plaintiff utility companies alleged the contracts would enable five federated cooperatives to engage in "destructive federally-subsidized competition" with them. The court interpreted the provision of the Administrative Procedure Act (APA)² granting standing to obtain judicial review to "[a] person suffering legal wrong . . . or adversely affected or aggrieved by agency action within the meaning of a relevant statute"³ as merely preservative of prior case law governing standing. That law, the court pointed out, gave the appellants no enforceable legal right to be free of such competition. Quoting the Supreme Court's opinion in *Alabama Power Co. v. Ickes*,⁴ the court suggested its reasons for its narrow construction of the APA provision.⁵ The court concluded by asserting broadly that

[c]learly, plaintiffs' interest as citizens, property owners, or franchise holders considered separately from, and not merely in aid of, their right to challenge alleged unlawful competition, confers no standing upon them to challenge defendants' actions in the courts. Merely as such, their status is no different from that of ordinary taxpayers who would not have standing to sue here. *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447 . . . (1923).⁶

The federal administrative agencies, performing roles created by Congress, were not lightly to be disturbed by the courts or the citizenry.

Fifteen years later, the same court decided *National Welfare Rights Organization v. Finch*.⁷ Under the Social Security Act, the Secretary of Health, Education, and Welfare was responsible for supervising distribution of federal funds to state welfare assistance programs and, if a state did not conform to federal statutory conditions, for discontinuing payments after notice and a hearing.⁸ Congress had expressly conferred on the states both the right to a hearing⁹ and judicial review.¹⁰ Other potential complainants were not given standing to appeal, either indirectly by creation of a statutory "right" or by other express statutory provision, nor were they provided an opportunity to intervene in con-

¹ 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

² 5 U.S.C. §§ 551-59, 701-06 (1970).

³ *Id.* § 702.

⁴ 302 U.S. 464, 480 (1938).

⁵ 225 F.2d at 928.

⁶ *Id.* at 933.

⁷ 429 F.2d 725 (D.C. Cir. 1970).

⁸ *See* 42 U.S.C. § 1316 (1970).

⁹ *Id.* § 1316(a) (2).

¹⁰ *Id.* § 1316(a) (3).

formity hearings. It was not entirely clear in *Welfare Rights* just who was attacking the agency or what injury was being inflicted on the plaintiff, an organization of welfare recipients: as one of the NWRO attorneys commented later, the attorneys themselves had selected their client.¹¹ Times, and judicial attitudes, had apparently changed, however. The court held that the NWRO had standing to obtain review and, further, the right to be admitted as a party in the administrative hearing below.¹²

If the new kind of litigant now appearing before the agencies and the courts is a strange beast,¹³ both its acceptance by the courts as a participant in the labyrinth of federal administrative agencies and the law the courts have constructed to accommodate it are stranger yet. Indeed, because lawyers have long been bringing their "own" lawsuits,¹⁴ the change in the nature of the litigant may not be as startling as the change in the view of the administrative agencies held by the public and the courts.

For there has indeed been a revolution in the scope of public participation¹⁵ in agency proceedings. Organic statutes were, in the heyday of optimism over governmental regulation, construed as vesting in the agencies the power within very wide limits both to define and to carry out public policy.¹⁶ Judicial review and the right to be heard before the agency were available only when the agency interfered with

¹¹ See Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1062 (1970).

¹² 429 F.2d at 734-37.

¹³ See generally Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970); Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Wexler, *supra* note 11; Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

¹⁴ See generally C. MARKMANN, *THE NOBLEST CRY: A HISTORY OF THE AMERICAN CIVIL LIBERTIES UNION* (1965).

¹⁵ The term "participation" will refer to all types of nongovernment activity before an administrative agency. "Intervention" in its most technical sense means entering a proceeding initiated by others with all the procedural rights of original parties. See BLACK'S LAW DICTIONARY 956 (4th ed. 1968). In its broader sense, the term includes participation in a proceeding with procedural rights which are often more limited than those of original parties. Unless otherwise indicated, the term is used here throughout in this broader, non-technical sense.

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The need was for an arm of government which would be judiciary, executive and legislature all rolled into one efficient and expert machinery for regulation. The trouble at the root of this idea was that its proponents held to a totally fallacious idea of how a decision can be made. They thought there was an "administrative" decision, somewhere in between a judicial and a legislative decision and partaking of both, which could be made by experts—
Griffiths, unpublished essay, quoted in Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1235 (1966). Compare Judge Kaufman's characterization of the "New Deal concept of administrative agencies as pristine, technocratic, and autocratic automations methodically perceiving and promulgating the general will, unsullied by the political wars that surge about them." Kaufman, *Power for the People—and by the People: The Utilities, the Environment, and the Public Interest*, 88 PUB. UTIL. FORT. 90, 94 (1971).

the legally protected interests of individuals. Today, with regulation more suspect, the judiciary has taken steps to ensure the opportunity to review all but the most insulated agency policy formulation and to require that the agencies carefully consider and include in a record any responsible policy position urged upon them. Requiring public participation has become, in part, a technique for forcing the agencies to engage in open, debated policy formulation and to construct a record more likely to facilitate judicial examination of the process and the result.

I. TOWARD A THEORY OF PUBLIC PARTICIPATION

Generalization in administrative law is admittedly dangerous. There is, however, helpful perspective in such an approach occasionally justifying the attempt. Throughout this Comment an effort will be made to minimize the necessary difficulties by focusing as much as possible on public intervention in adjudicatory hearings as set out under section 6 of the APA, and on appeals from agency action as governed by section 10.

A. *The Agencies and the Public*

Attacks on federal administrative agencies are widespread.¹⁷ One of the most common criticisms is that the interests of large segments of the public are not adequately represented in agency proceedings affecting them and that the agencies are not sufficiently accountable to the public.¹⁸ It is further charged that agencies are, to varying degrees,

¹⁷ The most telling recent criticism comes from two men intimately acquainted with agency decisionmaking at the highest level, former Commissioner Elman of the FTC and Commissioner Johnson of the FCC. See generally Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777 (1971); Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A.J. 1045 (1970); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869 (1971). See also P. MACAVOY, *THE CRISIS OF THE REGULATORY COMMISSIONS* (1970); PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, *A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES* (1971) (the "Ash Council Report").

¹⁸ This criticism sounded as a refrain throughout the 1970 hearings on the proposed Public Counsel Corporation. See generally *Hearings on S. 3134 & S. 2544 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). See also Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969); Calm & Calm, *The New Sovereign Immunity*, 81 HARV. L. REV. 929, 957-69 (1968). In response, the Administrative Conference of the United States has recently recommended several proposals which would accord inadequately represented interests more opportunity to participate in agency proceedings. Administrative Conference of the United States, Recommendation 28, adopted Dec. 7, 1971; see Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972) (based upon a report to the Committee on Agency Organization & Procedure of the Administrative Conference).

A number of public interest organizations have sponsored a set of model intervention rules. See 116 CONG. REC. 18,939, 18,942 (daily ed. Nov. 25, 1970). The model rules allow intervention in any agency adjudication, rulemaking, ratemaking, or licensing proceeding or "any other proceeding that may result in an order, sanction, or relief as defined in [§2 of the APA, 5 U.S.C. § 551 (1970)]." if the applicant's "pecuniary or economic interest is exclusively that of a consumer or is otherwise representative of the general public or of a particular geographical area, and if

too much under the influence of the interests they regulate,¹⁹ and that appointments to high agency positions are too often made on the basis of sheer accommodation of those interests.²⁰ Emphasis on agency expertise, it is said, means that some issues are ignored and others framed in such technical terms that non-experts and members of the general public wishing to speak to those issues are either overwhelmed by technical jargon or politely ignored.²¹ Indeed, in some contexts, hearings seem to serve only to legitimate decisions already made by agency staff.²² The public is unaware of the content and significance of formal agency proceedings, and virtually no one except the parties directly affected is aware of the content and significance of informal proceedings, many of which are conducted in private.²³ Investigatory facilities are said to be inadequate in some agencies to monitor the activities of the regulated interests.²⁴ Jurisdictional conflicts among agencies²⁵ make difficult the implementation of articulated national policies such as that embodied in the National Environmental Policy Act (NEPA).²⁶ Congress seems reluctant to pass major legislation to facilitate public awareness and active participation.²⁷ It is suggested that certain members of Congress exert a good deal of informal influence²⁸ over some activities of independent agencies that might be jeopardized by significant restructuring. Former Commissioner Elman of the FTC has noted a reluctance within that agency to make its organizational problems known to Congress.²⁹ Responses of other agencies to a 1969

participation by such person under the ordinary rules of practice would be unduly burdensome." An intervenor would have "all the rights of a party, including the right to appeal any initial decision" of the agency to the same extent as a party. The rules further provide for filing of single copies of documents, access to transcripts, subpoena powers, "reasonable legal assistance" from the agency's legal staff for intervenors who cannot retain counsel, and notice to "persons who have communicated to the Agency an interest in any subject matter or geographical area" within its jurisdiction of any proceeding that may affect that subject matter or area.

¹⁹ See, e.g., M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 86-102 (1955); R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION* 15-22 (1970); LAZARUS & ONEK, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971).

²⁰ Cf. Johnson, *supra* note 17, at 895.

²¹ See, e.g., Jowell, *The Limits of the Public Hearing as a Tool of Urban Planning*, 21 AD. L. REV. 123, 113 (1969); Plager, *Participatory Democracy and the Public Hearing: A Functional Approach*, 21 AD. L. REV. 153, 156 (1969).

²² See notes 876-81 *infra* & accompanying text.

²³ See notes 594, 678 *infra* & accompanying text. See also K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 4.12-13 (Supp. 1970) [hereinafter cited as K. DAVIS (1958 ed. unless otherwise indicated)]; LAZARUS & ONEK, *supra* note 19, at 1095.

²⁴ See, e.g., Johnson, *supra* note 17, at 881. See also notes 448, 624 *infra* & accompanying text.

²⁵ See generally 3 K. DAVIS, *supra* note 23, § 19.09 (1958 & Supp. 1970); Reich, *supra* note 16, at 1237.

²⁶ 42 U.S.C. §§ 4321-47 (1970).

²⁷ See notes 303-05 *infra* & accompanying text (Public Council Corporation); cf. notes 306-21 *infra* & accompanying text (Consumer Protection Agency).

²⁸ See, e.g., Johnson, *supra* note 17, at 905; cf. ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, REPORT 33 (1969).

²⁹ Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 780 (1971); cf. E. COX, R. FELLMETH & J. SCHULZ, *THE CONSUMER AND THE FEDERAL TRADE COMMISSION*, reprinted in 115 CONG. REC. 1539, 1545 (Jan. 22, 1969).

questionnaire of the Senate Subcommittee on Administrative Practice and Procedure, which asked for an evaluation of citizen input and agency responsiveness, reveal a similar self-satisfaction.³⁰ Finally, the standard of judicial review of agency action³¹ is thought to be too narrow both in terms of review of findings of facts and in terms of unwillingness to review action committed to agency discretion.³² Thus, pessimistically viewed, the agencies are too much under the influence of regulated interests and too insulated from judicial scrutiny; there is little movement in Congress toward reforming them; and certain interests shared by large segments of the public are inadequately represented before them. Regardless of the validity of any of these criticisms, the lack of public confidence they suggest may in itself seriously impair the efficacy of the administrative process.

B. *The Courts and Public Participation in Agency Decisionmaking*

At least concurrently with the expansion of public criticism of, and interest in participation in, agency proceedings, courts have expanded the scope of standing to challenge determinations made in those proceedings. In some cases where agencies have not voluntarily allowed intervention to a class of individuals broader than that granted standing to seek judicial review, courts have expanded the opportunity to intervene. Professor Jaffe has observed that

[t]here are two closely related motifs: whether an action is in any likely case reviewable at all . . . and whether the particular petitioner is a proper party to secure review. An opinion denying review may rest on the proposition that judicial scrutiny as such is excluded by statute or by general considerations of impropriety. . . . Or it may bear down on the lack of legal interest or "standing" of the plaintiff to secure review. . . . [I]f the class of persons most nearly affected does not have standing the action is for all practical purposes nonreviewable.³³

The trend is toward review. Thus, the District of Columbia Circuit in *Environmental Defense Fund, Inc. v. Ruckelshaus*³⁴ declared:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies

³⁰ SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE AGENCY DECISION-MAKING 5-16 (CAB), 19-29, 51-71 (FCC) (Comm. Print 1969) [hereinafter cited as RESPONSES].

³¹ See notes 136-54 *infra* & accompanying text.

³² See generally 4 K. DAVIS, *supra* note 23, §§ 28.01-21; Elman, *supra* note 29, at 785-94; Johnson, *supra* note 17, at 904-05.

³³ L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336-37 (1965) (emphasis supplied). See also Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

³⁴ 439 F.2d 584 (D.C. Cir. 1971).

and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the "substantial evidence" test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.³⁵

An examination of the current relationship between standing to appeal and opportunity to participate on the agency level suggests that expansion of the latter is more directly related to a desire to review policy decisions than to solicitude for the legal rights of the particular plaintiff. Three related generalizations about the cases seem appropriate. First, where a hearing is required to be held by an agency, no case appears to have approved the agency's denial of intervention to one the court held to have standing to appeal, except in the narrow situation where some party other than the agency was found to "represent the same interest" and was admitted.³⁶ Second, in those cases where a petitioning party was properly excluded from a hearing below on that ground, and where the party permitted to intervene failed to appeal, the excluded party has been granted standing to appeal.³⁷ Judicially articulated or not, the effect of these two phenomena is to help ensure that the maximum number of judicially reviewable issues has a plaintiff to bring them before the court with a record developed below that reflects at least that plaintiff's policy position. These cases, however, do not provide either opportunity to intervene or opportunity to appear before a court to all persons or groups raising those issues. Although this result is accomplished by finding that the party admitted to and the party excluded from any particular proceeding had the same "interest," this "test" is unlike the one applied, for example, in conventional situations involving questions of privity of contract. As the analysis below will suggest, it is doubtful whether current doctrines of standing retain a requirement of a "legally protected right" in which two or more individuals could be said to have something resembling a common "property interest."³⁸ Third, there is some language in recent cases

³⁵ *Id.* at 597.

³⁶ *Cf. Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

³⁷ See Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 767 (1968).

³⁸ See text accompanying notes 49-84 *infra*.

suggesting that the opportunity to participate in agency proceedings must be available to every party having standing to appeal the agency's action. While such a formulation would eliminate the problem of determining "identity" of interests, it does not seem to recognize the practical necessity for controlling the size of the proceedings. The oldest and clearest group of cases in this line involved agencies as to which the statutory language governing intervention was, on its face, entirely permissive, but was read as mandatory, when considered in light of the statutory context allowing appeals only by parties. The right to appeal depended on whether party status was enjoyed below, and whether that status was, on the face of the statute, discretionary with the agency. In *National Coal Association v. FPC*³⁹ the Court of Appeals for the District of Columbia Circuit held that a competitor had standing to appeal an FPC natural gas pipeline certificate award. Relying on a provision of the statute limiting appeal to aggrieved parties in the proceeding below, the court found that a competitor who would be aggrieved by an FPC order had a right to intervene.⁴⁰ More recent cases in the Second and District of Columbia Circuits have suggested that intervention may be required in order to make the right of review effective. *National Welfare Rights Organization v. Finch*⁴¹ involved an organic statute which immunized the Secretary's ultimate findings of fact from review, unless unsupported by substantial evidence, and required remand to the agency rather than review de novo by the courts.⁴² Judge Wright felt that the power to remand did not adequately ensure the effective review sought by the petitioning welfare recipients' organization and that at least limited participation below was required.⁴³ Judge Wright's argument relating intervention to the statutory language seemed an afterthought to the broad assertion that "[t]he right of judicial review cannot be taken as fully realized . . . , if appellants are excluded from participating in the proceeding to be reviewed."⁴⁴

The rumblings are equally audible in the Second Circuit, although not quite as strong, perhaps, as Professor Davis has indicated in his assertion that "[t]he Second Circuit seems to adopt a rule that a party having the right of judicial review must have the right of intervention."⁴⁵ The case Davis noted, *American Communications Association v. United States*,⁴⁶ explicitly referred to *National Coal's* holding that intervention below was required in order to secure the right to review (under a statute that conditioned review upon having attained party

³⁹ 191 F.2d 462 (D.C. Cir. 1951).

⁴⁰ *Id.* at 467.

⁴¹ 429 F.2d 725 (D.C. Cir. 1970).

⁴² 42 U.S.C. § 1316(a) (4) (1970). See also *id.* § 1316(a) (5).

⁴³ 429 F.2d at 737.

⁴⁴ *Id.* at 736.

⁴⁵ 1 K. DAVIS, *supra* note 23, § 8.11, at 388 (Supp. 1970).

⁴⁶ 298 F.2d 648 (2d Cir. 1962).

status below), and held that, even in the absence of an identical statutory context, intervention in the present case was necessary to secure an effective right to review.⁴⁷

No court has yet gone so far as to require intervention by every party entitled to appeal an agency determination. In some situations, review can arguably be effective without participation of the appellant in the proceedings below. In many proceedings, however, where some broad interest affected might be promoted by the adoption of any one of a number of policy positions, and the fairness of the decisionmaking process turns not so much on the verification of factual data (which might be effectively presented by only one party) as on the resolution of conflicting policy positions (which are best presented by a variety of different parties), "identity of interest" is a difficult test to apply in excluding potential participants from agency proceedings, or, for that matter, potential appellants from full participation in judicial review. The goal of public participation should be the fullest feasible debate on the issues, rather than the "representation" of broadly or narrowly defined "interests."⁴⁸

If the judicial standing rule were well defined or narrowly circumscribed, it might be possible to define the minimum scope of the right to intervene by reference to the maximum scope of standing to obtain judicial review (leaving the agencies with discretion to permit fuller participation in appropriate cases). The rule, however, seems to have approached the case-or-controversy limit imposed by the Constitution, and is consequently both vague and expansive: as the following analysis will demonstrate, the courts have made the concept of an "interest" conferring standing to obtain review very flexible, and hence unreliable as a standard for choosing worthy participants in agency proceedings.

Although the two are related, it is important to distinguish standing before courts to initiate review of administrative action from standing before agencies to intervene in their proceedings.⁴⁹ Except

⁴⁷ *Id.* at 650-51.

⁴⁸ See notes 162-67 *infra* & accompanying text.

⁴⁹

Since both standing to obtain review and the right to intervene in an administrative proceeding involve a determination of what interests are deserving of legal protection, one might initially suppose that the law governing intervention and standing would be about the same. But many factors affect one and not the other. Statutes concerning intervention usually differ from those concerning review. The central problem of intervention is usually the disadvantage to the tribunal and to other parties of extended cross-examination; judicial review involves no such problem. Adequate protection for interests obliquely affected may often be afforded through limited participation; no such compromise concerning judicial review is customary. No constitutional restrictions affect intervention; standing to obtain review is substantially affected by the constitutional requirement of case or controversy. Intervention means mere participation in a proceeding already initiated by others; obtaining judicial review normally means instituting an entirely new judicial proceeding.

3 K. Davis, *supra* note 23, § 22.08, at 241. See also 1 *id.* § 8.11, at 564; Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 COLUM. L. REV. 759, 768-72 (1949).

to the extent that statutes preclude judicial review,⁵⁰ or agency action is committed to agency discretion,⁵¹ standing for purposes of judicial review is governed by section 10 of the Administrative Procedure Act:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.⁵²

This right of review was first held, in the absence of a broader provision in the organic statute of an agency,⁵³ merely to codify pre-existing case law, which had conferred standing only when the plaintiff was threatened with or had suffered a "legal wrong,"⁵⁴ presumably the correlative of a "legal right," which the Supreme Court had described as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."⁵⁵ In 1968 the Supreme Court held that a private utility alleging improper expansion of TVA services into its market area should be granted standing where there was an implicit congressional intent in the organic statute to benefit it.⁵⁶

In 1970 the Court decided *Association of Data Processing Service Organizations v. Camp*⁵⁷ and *Barlow v. Collins*.⁵⁸ These companion cases completely rejected the legal wrong test and substituted in its place the rule that a plaintiff has standing if he alleges that "the challenged action has caused him injury in fact, economic or otherwise"⁵⁹ and that the injured interests are "arguably within the zone of interests

⁵⁰ 5 U.S.C. § 701(a) (1) (1970).

⁵¹ *Id.* § 701(a) (2).

⁵² *Id.* § 702.

⁵³ In *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), the Court granted the plaintiff standing to challenge the grant of a license to a competitor under the Federal Communications Act, which provided for appeal by "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application [for an operating license]." Communications Act of 1934, Pub. L. No. 73-416, § 402(b) (2), 48 Stat. 1093, as amended, 47 U.S.C. § 402(b) (6) (1970). The Court felt that the legislative history permitted a broad reading of the provision and that a competitor might be the only party with sufficient interest to challenge illegal agency action. 309 U.S. at 477. In *Associated Indus., Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), the Second Circuit made the theory more explicit: a competitor might act as a "private Attorney General" to "vindicate the public interest" by assuring compliance with the law. Generally, the courts have allowed challenges to administrative action by competitors where it is felt that no other party is sufficiently disadvantaged or has sufficient incentive to seek judicial review. Cf. notes 136-54 *infra* & accompanying text.

⁵⁴ See *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955).

⁵⁵ *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939).

⁵⁶ *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 7 (1968).

⁵⁷ 397 U.S. 150 (1970).

⁵⁸ 397 U.S. 159 (1970).

⁵⁹ 397 U.S. at 152.

to be protected or regulated by the statute or constitutional guarantee in question."⁶⁰ The Court noted that these interests included non-economic ones, such as conservation and aesthetics.⁶¹ The test has been much discussed and criticized.⁶² Professor Davis has argued that the test is wrong, insofar as it requires a determination that the interest is protected by the statute in question, and that the sole test should be injury in fact.⁶³ Professor Jaffe, on the other hand, maintains that "a plaintiff who does not have a 'protected interest,' whether as an individual or a group, does not have a *right* to review, but that a court in its discretion may at the suit of such person review the legal question if it deems such consideration to be in the public interest."⁶⁴ Jaffe seems to construe the phrase "zone of interests" narrowly, for he argues that this discretion should be exercised if it appears that "those having a defined 'legal' interest do not adequately represent all of the interests intended to be protected by the legislation and if there is no device for public control" or if the court concludes that the public authorities are insufficiently responsive to the unrepresented interests.⁶⁵ The requirement that the plaintiff's interest be "arguably within the zone of interests to be protected or regulated" on its face preserves some element of Jaffe's "legal interest" and may allow the discretion he advocates. If, on the other hand, the interest requirement is consistently read as broadly as its vagueness permits, the test may be reduced to Davis' sole criterion of injury in fact, which is susceptible of broad interpretation as well.⁶⁶

What will limit the discretion inherent in the broad formulation of the standing test in *Data Processing*? The principal constraint is the article III limitation of the judicial power to cases or controversies. Requiring some personal stake—an interest or injury not shared by

⁶⁰ *Id.* at 153.

⁶¹ *Id.* at 154.

⁶² See, e.g., K. DAVIS, *supra* note 23, §§ 22.00 to .00-5 (Supp. 1970); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540 (1971); Note, *Standing to Challenge Administrative Action: The Concept of Personal Stake*, 39 GEO. WASH. L. REV. 570 (1971).

⁶³ See K. DAVIS, *supra* note 23, §§ 22.00 to .00-5 (Supp. 1970). Davis argues that the second part of the test is faulty because (1) it limits the extension of common-law remedies; (2) it excludes plaintiffs whose interests were not to be regulated by the statute even if they were in fact regulated; (3) it is inconsistent with previous cases granting standing on the basis of injury in fact; (4) it is contrary to the congressional intent in the APA; and (5) the inquiry into legislative history it requires is cumbersome and often inconclusive. *Id.* § 22.00-3.

⁶⁴ Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 634-35 (1971) (emphasis in the original).

⁶⁵ *Id.* 637. Jaffe cites *National Ass'n of Securities Dealers v. SEC*, 420 F.2d 83 (D.C. Cir. 1969), *vacated on other grounds sub nom. Investment Company Institute v. Camp*, 401 U.S. 617 (1971), as a case where plaintiffs' legal interest was doubtful, but standing was granted because the questions were of large public interest. In this case there was no general grant of review to aggrieved parties as in *Sanders*, see note 53 *supra* & accompanying text, and no implied intent to protect plaintiffs discernible in the legislative history, as there was in *Hardin*, see note 56 *supra* & accompanying text.

⁶⁶ See 397 U.S. at 154.

members of the general public—is said to “assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult . . . questions.”⁶⁷ It has been suggested, however, that the requirement of a peculiar personal interest is a mechanism for judicial self-restraint rather than a constitutional requirement.⁶⁸ Judicial self-restraint deters courts from attempting to extend their power to reach political disputes. The prospect of increased litigation and decreased efficiency of the judicial system has been raised, but as a practical matter the actual cost of litigation tends to prevent frivolous suits, just as it tends to serve the article III requirement of case or controversy.⁶⁹ There is, finally, some possibility that, if the parties whose interests lie on the periphery of the “zone” or whose “injury in fact” is very slight, were granted standing, they might use the delay accompanying judicial review to coerce those whose interests were more central.⁷⁰ None of these potential limitations, however, compels a narrow reading of the *Data Processing* holding.

If personal involvement in the outcome is indeed required by the Constitution, it may be a very small one in economic terms,⁷¹ or even an ideological stake difficult to ascribe to a particular person or group.⁷² Indeed, in *Scenic Hudson Preservation Conference v. FPC*⁷³ and *Office of Communication of the United Church of Christ v. FCC*,⁷⁴ it is difficult to discern how the plaintiffs had any more interest in aesthetics, conservation, and recreation, or in the prevention of racial and religious bias in television programming, than members of the public at large, other than the fact that they had chosen to band together, at great cost, to articulate those interests.⁷⁵ These cases, cited by the Court in *Data Processing* as examples of the “injury” required by the test,⁷⁶ suggest that the injury need not distinguish the plaintiff from members of the public at large.

⁶⁷ *Baker v. Carr*, 369 U.S. 186, 204 (1962). If “concrete adverseness” lies at the heart of the requirement, is not such adverseness demonstrated by willingness to bear the cost of litigation? See Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-38 (1968).

⁶⁸ See Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Note, *The Essence of Standing: The Basis of a Constitutional Right to be Heard*, 10 ARIZ. L. REV. 438 (1968); cf. *Flast v. Cohen*, 392 U.S. 83, 93-94 (1968).

⁶⁹ See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 634 (1968); cf. *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

⁷⁰ Cf. notes 873-81 *infra* and accompanying text.

⁷¹ See Davis, *supra* note 69.

⁷² See, e.g., *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) (standing to seek injunction against construction of Nativity scene in federal park conferred by plaintiffs' interest in establishment clause and free-exercise clause).

⁷³ 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁷⁴ 359 F.2d 994 (D.C. Cir. 1966).

⁷⁵ See Jaffe, *supra* note 67. But see *Sierra Club v. Hickel*, 433 F.2d 24, 30 (9th Cir. 1970), *aff'd sub nom. Sierra Club v. Morton*, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972); Note, *supra* note 62, at 588-91.

⁷⁶ See 397 U.S. at 154.

The extent to which the law of standing has consequently expanded, so that any concerned citizen or group can be considered "aggrieved" within the meaning of section 10 of the APA, is, however, still unclear. In *Citizens Committee for the Hudson Valley v. Volpe*,⁷⁷ the Second Circuit determined that a resident citizens group and a national conservation organization that were concerned with the beauty of the Hudson River Valley had standing to contest the issuance of a dredge and fill permit by the Army Corps of Engineers to the State of New York for the construction of a proposed highway.

Two of the plaintiffs (the Citizens Committee and the Sierra Club) made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were "aggrieved" when the Corps acted adversely to the public interest.⁷⁸

The groups "evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened" ⁷⁹ The court held that standing "as responsible representatives of the public" was afforded by the public interest in environmental resources recognized by several federal statutes.⁸⁰

The Supreme Court, however, has recently rejected the *Hudson Valley* approach, holding instead that "a mere 'interest in a problem,' no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA," in *Sierra Club v. Morton*.⁸¹ The Court felt that the "requirement that a party seeking review must allege facts showing that he is himself adversely affected" would "serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct

⁷⁷ 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

⁷⁸ *Id.* at 102.

⁷⁹ *Id.* at 103.

⁸⁰ See *id.* at 104-05.

⁸¹ 40 U.S.L.W. 4397, 4401 (U.S. Apr. 19, 1972), *aff'g* *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970). Petitioner Sierra Club had sought declaratory and injunctive relief against the issuance by the United States Forest Service of permits for a "\$35 million complex of motels, restaurants, swimming pools, parking lots, and other structures [including 'ski lifts, ski trails, a cog-assisted railway, and utility installations] designed to accommodate 14,000 visitors daily," and against the approval by the Department of the Interior of a 20-mile highway and a high-voltage power line to serve the complex. 40 U.S.L.W. at 4398. The focus of these developments was to be the Mineral King Valley, "an area of great natural beauty nestled in the Sierra Nevada Mountains . . . adjacent to Sequoia National Park." *Id.*

stake in the outcome."⁸² It seems obvious, however, that, on the facts presented, there was no significant difference between the "interest" alleged by the organization and the "interests" of its members who used the affected area for recreational purposes, and this fact seems implicit in the dissenting opinions. Justice Douglas suggested that

[t]he critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object to be dispoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.⁸³

And, in his thoughtful dissent, Justice Blackmun pronounced Douglas's approach imaginative, and presented the following argument, which speaks for itself:

. . . I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. . . . We need not fear that Pandora's box will be opened or that

⁸² 40 U.S.L.W. at 4401. The Court noted that

[t]he Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public."

Id. at 4400 (footnote omitted). The Court found the following statement of the club's "interest" in the original pleadings inadequate:

Plaintiff Sierra Club is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the Club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay area. For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears.

Id. at 4400 n.8. The club could have easily relied upon individual interests of its members, such as the fact that "various members of the Club have used and continue to use the area for recreational purposes"; and the Court noted that its decision did not bar the club from seeking to amend its complaint accordingly. *Id.* The lapse of time, however, makes obtaining the relief originally sought much more difficult, as Justice Blackmun pointed out in his dissent. *Id.* at 4406.

⁸³ *Id.* at 4402 (footnote omitted). Justice Douglas relied in part on arguments contained in Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for today?⁸⁴

The effect of *Data Processing* on intervention in agency proceedings is not yet clear. Section 6(a) of the APA provides:

A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.⁸⁵

This section gives the agency discretion in the first instance to determine when, where, and how an "interested person may appear." It does not in terms define what interest a person or party must demonstrate or what form an interested person's or party's participation is to take. The organic statutes are, with few exceptions,⁸⁶ equally vague as to what kind of interest entitles one to participate and what form such participation may take. Definition is usually left to the agency, subject to judicial review. The judicial power to construe an agency's statutory mandate, and to review its determination of the interests that must be considered thereunder and of the procedural rights that must be accorded those representing such interests, constitutes perhaps the most powerful check on administrative action. This power has been utilized to expand the definition of those interests that must be allowed to intervene and the scope of that intervention.⁸⁷

The two *United Church of Christ* appeals⁸⁸ reveal perhaps the furthest incursion by a court into an agency's discretion to shape its intervention policy.⁸⁹ The court, rejecting the assumption that an agency always represents the totality of the public interest,⁹⁰ initially held that members of the listening public were entitled to intervene

⁸⁴ 40 U.S.L.W. at 4406-07.

⁸⁵ 5 U.S.C. § 555(b) (1970).

⁸⁶ See, e.g., notes 732-35 *infra* & accompanying text.

⁸⁷ Cf. notes 57-84 *supra* & accompanying text.

⁸⁸ See notes 363-76, 426-36 *infra* & accompanying text.

⁸⁹ Cf. Note, *Expansion of "Public Interest" Standing*, 45 N.C.L. Rev. 998 (1967).

⁹⁰ See note 373 *infra* & accompanying text.

before the FCC⁹¹ and later expressed profound dissatisfaction with the form of participation granted the intervenors.⁹²

The two *United Church of Christ* appeals were precursors to the broad test established in *Data Processing*.⁹³ How that test will influence standing to intervene in agency proceedings was discussed, if not resolved, in *National Welfare Rights Organization v. Finch*.⁹⁴ That case first confronted a problem involved in standing to obtain judicial review which also arises in the FPC and FTC:⁹⁵ whether a statutory grant of standing to obtain review to one class implies denial of standing to other classes. In *Welfare Rights*, the question was whether a specific grant of standing to states to seek review of determinations whether their laws were in conformity with the Social Security Act, implied that welfare recipients did not have a similar right. Judge Wright noted that, although the statutory scheme spoke "only of the functions of the Secretary and the rights of the state to a hearing and judicial review,"⁹⁶ such review should not be denied welfare recipients, who otherwise met the *Data Processing* test,⁹⁷ absent a clear showing that Congress intended to deny such review. Finding "that Congress gave the states standing in order to strengthen federalism,"⁹⁸ the court declared that "it is not contrary to that purpose that welfare recipients also have standing to seek review."⁹⁹

One serious problem remained. Unlike the organic acts of the agencies considered in this Comment which make some general provision for intervention, the Social Security Act is silent as to whether participation in the prehearing negotiations and the formal conformity hearings was limited exclusively to the Department of Health, Education, and Welfare and to the states affected,¹⁰⁰ though HEW's practice apparently was to permit, in its discretion, some limited forms of third-party participation in the hearings.¹⁰¹ The court noted that "specific statutory provisions explicitly controlling intervention are exceptional when viewed in the context of all legislative enactments pertaining to administrative proceedings" and that such provisions perhaps "represent special recognition by Congress of a need to have interested parties

⁹¹ See notes 374-76 *infra* & accompanying text.

⁹² See notes 431-36 *infra* & accompanying text.

⁹³ See notes 53-84 *supra* & accompanying text.

⁹⁴ 429 F.2d 725 (D.C. Cir. 1970). See Comment, *Intervention in HEW Welfare Conformity Proceedings*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 559 (1971).

⁹⁵ See notes 682-706 (FTC), 746-47, 763-74 (FPC) *infra* & accompanying text.

⁹⁶ 429 F.2d at 732.

⁹⁷ *Id.* at 735.

⁹⁸ *Id.* at 736.

⁹⁹ *Id.* (emphasis in the original). The Ninth Circuit recently reached a contrary conclusion in an analogous statutory context. See *Rasmussen v. Hardin*, 40 U.S.L.W. 2674 (9th Cir., Mar. 29, 1972).

¹⁰⁰ See *id.* at 731-32.

¹⁰¹ See *id.* at 731 n.21.

involved in agency proceedings to protect the public interest."¹⁰² As a general rule, however, the court felt that "[e]xcept for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene."¹⁰³

Although the court did not explicitly equate standing to obtain review with standing to intervene, it held, on the facts presented, that the "right of judicial review cannot be taken as fully realized . . . , if appellants are excluded from participating in the proceeding to be reviewed."¹⁰⁴ Under the circumstances presented in *Welfare Rights*, and especially in light of the statutory provision that the Secretary's findings of fact should be conclusive if supported by substantial evidence,¹⁰⁵ the court felt that important issues might be foreclosed on review and that a full consideration of the competing interests would only be possible through appellants' "full participation in the initial agency hearing."¹⁰⁶ The statutory provision for remanding to the agency with instructions to take further evidence was not sufficient to cure the deficiency.¹⁰⁷ The court felt that participation in the conformity hearing would help avoid a multiplicity of suits¹⁰⁸ and recognized that the expense of participation would limit any great influx of welfare recipients into the hearings.¹⁰⁹ The court approved limiting intervention to groups which seem best able to represent the common interests of welfare recipients.¹¹⁰ Most important, the court stated that it contemplated enlargement of the participation already allowed such groups¹¹¹ "only to the extent of an additional right to present live

¹⁰² *Id.* at 732 (footnotes omitted).

¹⁰³ *Id.* at 732-33. The court did not reach NWRO's claim that it had a constitutional due process right to intervene. 420 F.2d at 734 n.33. See Comment, *supra* note 94, at 569-71.

¹⁰⁴ *Id.* at 736. The court relied primarily on the reasoning of *American Communications Ass'n v. United States*, 298 F.2d 648 (2d Cir. 1962), and of Judge Sobeloff's dissent in *First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965). In the latter case, the majority held that the Comptroller of Currency could authorize establishment of a branch of a national bank without first affording a hearing, even though a competitor had a right to judicial review of that decision. Cf. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 70-71 (1970). In *Data Processing*, the Supreme Court did not consider whether plaintiff had a right to a hearing before the Comptroller prior to the issuance of regulations that might affect its interest. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970).

¹⁰⁵ 429 F.2d at 737.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* The likelihood in many cases that only a hearing will cure an erroneous denial of intervention strengthens the argument that denial should be immediately appealable to the full agency and thereafter to the court of appeals. See Note, *Intervention by Third Parties in Federal Administrative Proceedings*, 42 NOTRE DAME LAW. 71, 76-77 (1966).

¹⁰⁸ 429 F.2d at 738.

¹⁰⁹ *Id.* at 738-39.

¹¹⁰ *Id.* at 739; cf. notes 374-76 *infra* & accompanying text. Thus, an individual welfare recipient might properly be denied intervention in favor of the National Welfare Rights Organization and its state counterpart.

¹¹¹ See note 101 *supra* & accompanying text.

witnesses and to cross-examine witnesses for other parties,"¹¹² that these groups were not entitled to participate in informal negotiations between HEW and the states, and that the Secretary's right to terminate a hearing upon his determination that conformity had been reached would be unaffected. The court further emphasized that the problems of extended cross-examination and introduction of testimony irrelevant to the issues before the agency should be controlled by the hearing examiner.¹¹³

Welfare Rights, then, is a good summary of the law—and the confusion—regarding the relationship between standing to obtain review and standing to intervene. In cases where a hearing is held, groups meeting the *Data Processing* test for review have standing to intervene to the extent necessary to make the right of review effective. Having established that principle, the court in *Welfare Rights* proceeded to define the procedural rights that would make the right of review effective under the circumstances presented, carefully preserving to the agency the power to limit intervention to particularly representative groups, to exclude repetitive or irrelevant testimony, and to exclude intervenors from private informal negotiations. The court established no precise formula from which the nature and extent of an intervenor's procedural rights may be derived.

Because the problems of intervention before courts and agencies are frequently similar, an examination of rule 24 of the Federal Rules of Civil Procedure and its shortcomings may reveal some principles equally applicable to agencies.¹¹⁴ To the extent that a group would have standing under the *Data Processing* test to initiate review of agency action, it would seem, at first blush, that it should be allowed to intervene in review initiated by another. Rule 24, however, seems

¹¹² 429 F.2d at 739.

¹¹³ *Id.* at 739 n.46.

¹¹⁴ There are of course considerations which are unique to intervention before courts. A prospective intervenor may be bound by the judgment; he may have a related claim or defense which might be prejudiced if he were not allowed to intervene, or which might avoid duplication, delay, or inconsistent results if tried with the original case. In diversity cases, he would have to meet jurisdictional requirements. See Shapiro, *supra* note 37, at 731-34. Given the limited scope of review, see notes 135-55 *infra* & accompanying text, and the concern it reflects that courts should not, indeed cannot, perform the tasks of the agency *de novo* on appeal, perhaps the only inquiries of the court should be whether the interest of the party attacking the agency decision should have been considered by the agency and in fact was not, and whether there was substantial evidence in favor of other interests. The limited scope of judicial inquiry might thus reduce the need for full representation of all parties appearing before the commission, though the need obviously varies with the nature of the agency action under review. Compare Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), in which the central question—whether the essentially procedural rules promulgated by the AEC fully complied with the purpose of the National Environmental Policy Act of 1969 § 102(2), 42 U.S.C. § 4332(2) (1970)—could arguably have been decided without extensive participation by power companies (although in fact one company did intervene and several others filed briefs as amici), with Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), in which resolution of the complicated factual issues involved in the court's review of the record was arguably facilitated by extensive participation by third parties.

considerably more restrictive.¹¹⁵ Professor Shapiro has criticized the present rule on the ground that intervention as of right under rule 24(a) may be granted too freely to certain intervenors¹¹⁶ while the scope of permissive intervention under rule 24(b) is too limited, and restricts the scope of intervention by public interest groups or "private attorneys general."¹¹⁷ He has proposed a functional approach to permissive intervention which would consider

(1) the nature and extent of the applicant's interest in the subject matter of the action and the degree to which the disposition of the action may as a practical matter impair or impede his ability to protect that interest; (2) the adequacy of representation of the applicant's interest by existing parties; (3) the relationship of the applicant's claim or defense, if any, to the subject matter of the action; (4) the avoidance of multiplicity of actions; (5) whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties; and (6) the contribution the applicant may make to the just determination of the issues.¹¹⁸

Shapiro would also give the court wide discretion to limit the scope of permissive intervention and intervention as of right, and would make denial of either immediately appealable.¹¹⁹ An appeal would not stay proceedings unless so ordered by a court.¹²⁰ Under the present rule 24(a), the fact that the potential intervenor's interest is adequately represented by existing parties is a ground for denying intervention altogether; Shapiro's proposal might permit informal or limited intervention as an alternative to outright denial. It seems clear, however, that under either, meeting the *Data Processing* test alone does not automatically confer a right to intervene in a court proceeding, or, as *Welfare Rights* indicates, in an administrative proceeding.

¹¹⁵ FED. R. CIV. P. 24:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

¹¹⁶ See Shapiro, *supra* note 37, at 757-59; cf. notes 625-40 *infra* & accompanying text.

¹¹⁷ See Shapiro, *supra* note 37, at 758.

¹¹⁸ *Id.* at 762.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 762-63.

C. Pursuing "The Public Interest"

1. The Decisionmaking Model

The agencies here considered are charged to act in accordance with the public interest.¹²¹ This bare mandate is vague; at times, it is misleading. Criticisms of current agency practice and attempts to define the public interest in the administrative context have largely focused upon devising procedures whereby "better" decisions may be derived, rather than dictating the substantive norms that are most "in the public interest" in specific contexts. Charles Reich, for example, argues that the federal agencies, apparently defining the term "public interest" to mean the harmonious balancing of as many of the competing or conflicting interests as possible in a specific factual context,¹²² contribute to the "central myth . . . that decisions concerning planning and allocation can be, and are, made on an objective basis."¹²³ Adjudicatory procedure enhances the myth, by giving the impression that value choices—"what kind of television programs Boston should have," for example—can be decided before agencies, as issues of fact are tried to courts of law.¹²⁴ The adjudicative process, with its ad hoc, passive mediation of the powerful private economic interests which customarily present themselves before it, according to rules of procedure which tend to foreclose consideration of unargued alternatives or attention to unrepresented interests, inhibits the independent formation of general policies.¹²⁵ Reich views the administrative process as fundamentally conservative and responsive only to immediate pressures.¹²⁶ He urges that it has a responsibility for wide-ranging, independent, innovative planning, which can be fulfilled in part by a broader definition of the issues each agency must consider and by a much broader spectrum of information upon which to base its value choices.

Reich implies a proposition that needs to be articulated more precisely and forcefully. In a highly pluralistic society such as ours, it is almost impossible to say that there is a unitary public interest or that any proposed action is *a priori* in the public interest.¹²⁷ Apart from

¹²¹ See, e.g., 47 U.S.C. § 303 (1970) (FCC).

¹²² Reich, *supra* note 16, at 1234.

¹²³ *Id.* 1235.

¹²⁴ *Id.* Some early theorists, and especially Max Weber, viewed the purpose of the administrative process as the expert formulation of a system of rules, based upon general principles implicit in the social structure or defined by the legislative branch, to be applied to specific cases. See, e.g., G. BERKLEY, *THE ADMINISTRATIVE REVOLUTION* 8-9 (1971). The neutral development and application of a national policy might, under this view, be impeded if an agency were to respond to sectional interest groups.

¹²⁵ Reich, *supra* note 16, at 1238-39.

¹²⁶ *Id.* 1239.

¹²⁷ The only arguably neutral criterion of the public interest would seem to be whether a perfectly generalizable effect felt by all citizens is "helpful" or "harmful." Assume that the lives of citizens of a country must be preserved. Universal distribution of a vaccine needed to forestall an epidemic is in the public interest, while

the obvious minimal function of the term as a symbol or "facade for special interests and partisan position in the political battle"¹²⁸ and the tautology that the public interest is what the agency charged to act in the public interest defines it to be, there seem to be three views of decisionmaking in the public interest—those Glendon Schubert calls "rationalist," "idealist," and "realist"—which have served as bases for models of the administrative process:

The rationalists . . . envisage a political system in which the norms are all given . . . and the function of political and bureaucratic officials alike is to translate the given norms into specific rules of governmental action. The idealists . . . conceive of the decision-making situation as requiring the exercise of authority to engage in social planning by clarifying a vague criterion. The realists . . . state that the function of public officials is to engage in political mediation of disputes; the goals of public policy are specific but in conflict.¹²⁹

Schubert characterizes rationalists as "propublic, property, and anti-interest group." They believe in the "popular will," which they determine either through the outcome of the contests of a strong two-party system or directly by consulting public opinion. "In both instances, administrators and judges are supposed to exercise technical discretion [discretion to define the means but not the goal] to carry out norms which they do not make, but which are supplied to them in the form of constitutional provisions, statutes, and executive orders."¹³⁰

Idealists are "propublic, antiparty, and anti-interest group." They conceive of the public interest in terms of a substantive natural law, which may or may not be perceived by the public itself, and are only in that sense "propublic." The public interest "is what the elite thinks is good for the masses," and the administrative process entails

turning the country's military forces on the civilian population, even to preserve the stability of a country's political structure, is not. But such unitary imperatives are rare in modern pluralistic societies, as are effects as generalizable as those of plague and civil war. Theorists, such as Jeremy Bentham, who posit the public interest to be the sum of all private interests (the latter being widely defined to include aesthetic, moral, and kindred interests of individuals, as well as the more traditional "legal" interests such as a contractual right) find it difficult to explain the source of decision-making criteria applied by an administrative body to achieve a balance in a particular case. See J. BENTHAM, *A FRAGMENT ON GOVERNMENT AND PRINCIPLES AND MORALS OF LEGISLATION* 126 (1 vol. ed. 1948); note 122 *supra* & accompanying text. See generally NOMOS V: *THE PUBLIC INTEREST* (C. Friedrich ed. 1962) [hereinafter cited as NOMOS V].

¹²⁸ Friedrich, *Preface to Nomos V*, *supra* note 127, at vii.

¹²⁹ Schubert, *Is There a Public Interest Theory?*, in NOMOS V, *supra* note 127, at 164. See also Schubert, "The Public Interest" in *Administrative Decision Making: Theorem, Theosophy, or Theory?*, 51 AM. POL. SCI. REV. 346 (1957).

¹³⁰ Schubert, *Is There a Public Interest Theory?*, in NOMOS V, *supra* note 127, at 164-66.

primarily "the exercise of craft and conscience"¹³¹ to achieve the administrator's perception of that good.

Realists are prointerest group, and tend to view both parties and the general public in terms of their constituent groups. They view decisionmaking as (1) responding to pressures actually exerted upon them by groups, (2) responding to interests that they perceive, but which are not actively pressed upon them, in addition to those pressures actually exerted, or (3) independently determining goals based upon what they conceive to be an ideal balancing of the interests and pressures they perceive. This third variant differs from the idealist view only in that these realists make an effort to ascertain the desires and needs of the interest groups they perceive, and hence this variant is less inherently conservative than the first, which looks to existing pressures and their relative strengths, thereby favoring the status quo.

Schubert associates these realist attitudes toward the administrative process with what he calls the due-process-equilibrium model. Its basic principle is that "decisions reached as a result of . . . full consideration [of all available relevant information, including, in appropriate contexts, opinion] are more likely to meet the test of equilibrium theory—i.e., 'satisfaction,' acceptance, and the like—and do so most of the time . . ."¹³² Decisions in the public interest result from the application of proper procedures. Thus, the model concentrates on decisions that are "acceptable," rather than decisions that are "right" in an abstract sense: the emphasis is on procedures more than on underlying norms or values.

The due-process-equilibrium model of administrative decision-making, and the definition of the public interest derived therefrom, seem the most workable. There is, of course, no way this highly abstract model can be proved "correct" or "incorrect"; perhaps the only relevant questions about it are whether it has an internal logic, whether it makes provision for all relevant variables, and—since it is, after all, an ideal—whether it seems reflected in the thinking of people with practical experience in the area.¹³³

¹³¹ *Id.* 166-67.

¹³² *Id.* 170-71.

¹³³ Reich, under this analysis, initially seems part idealist, part realist. He seems an idealist in that he wants the agencies to exercise broad planning powers insulated from immediate pressures. His more specific proposals—broader sets of criteria for the agencies to consider, increased public participation in agency proceedings, advisory hearings, institutionalized representation of previously unrepresented interests—seem those of a realist intent on improving a basically sound system. His view of decision-making, then, is probably closer to the third realist variant. Similarly, FCC Commissioner Johnson's suggestions go to improving FCC procedure by insulating the Commission from unduly concentrated influence by any particular interest, by increasing the informational inputs through encouragement of participation, by improving its investigatory facilities, by obtaining as many "expert" points of view as possible before making wide-ranging policy decisions, and by reducing regulatory delay. See generally Johnson, *supra* note 17. His suggestions, like Reich's, imply an assumption that the due-process-equilibrium model will be viable if the process afforded is fair, that is, if all interests affected by a decision are allowed to present information (in-

The source of the decisionmaker's values is the central problem of this model. Because it draws on the judicial model, it assumes certain judicial qualities in the decisionmaker, most notably a degree of impartiality toward or insulation from the parties before him. But the model also contemplates that agency independence and expertise will prevent the decisionmaker from being too much bound by precedent. It invests him with more discretion, not always exercised, to formulate policy than his judicial counterpart: he is free, to some extent, to choose his own values. This problem is especially characteristic of the third variant of realist decisionmaking.

Ultimately, Congress and the courts retain great power to dictate values to agency decisionmakers, a power which may be more frequently exercised in the future. Congress, in supplying only the bare mandate to act in the public interest, has not historically concerned itself with providing specific values for decisionmakers. Recently, however, popular concern over environmental damage has led Congress to attempt to provide a more specific value in this area. The National Environmental Policy Act (NEPA)¹³⁴ purports to force decisionmakers to include among their values a concern for preventing further damage to the environment. The resistance that has met the NEPA leads one to doubt that values can be effectively imposed in this broad manner. With the exceptions of radical restructuring of the agencies, and of informal mechanisms of control exercised by Congress and the President (such as budget allocations and appointment of personnel), case-by-case examination by the courts may provide the only effective review of agency value choices.

Traditionally, the courts have been reluctant to impose values upon agency decisionmakers. They have, for example, found agency implementation of the NEPA deficient in several instances.¹³⁵ But, because of largely self-imposed limitations upon their own power to review administrative decisions and thereby substitute their own judgment, courts have at most demanded strict adherence to procedure,¹³⁶ or strict con-

cluding, where appropriate, opinion) to the decisionmaker. Former FTC Commissioner Elman seems more the rationalist in that he would increase the accountability of the Commission to the President and Congress. He is, however, dealing with an agency enforcing vague statutory prohibitions, and he does concede that the FTC's rulemaking processes should be decentralized and opened to more points of view. See note 583 *infra*.

¹³⁴ 42 U.S.C. §§ 4321-47 (1970).

¹³⁵ See, e.g., *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Committee for Nuclear Responsibility v. Seaborg*, No. 71-1732 (D.C. Cir., Oct. 5, 1971). For accounts of the effect of the NEPA in increasing the number of issues the agency must consider, or in increasing agency responsibility to explore alternative modes of action, see notes 800-03, 901-13 *infra* & accompanying text.

¹³⁶ "Section 102 of NEPA requires, inter alia, that an impact statement assess adverse environmental effects and discuss alternatives to the proposed action. On the ultimate issue whether a project should be undertaken or not, a matter involving the assessment and weighing of various factors, the court's function is limited. However, the court has a responsibility to determine whether the agencies involved have fully and in good faith followed the procedure contemplated by Congress" *Committee for Nuclear Responsibility v. Seaborg*, No. 71-1732, at 5-6 (D.C. Cir., Oct. 5, 1971) (footnote omitted).

struction of an agency's statutory authority.¹³⁷ What prevents courts from going further? The APA provision for review is, on its face, quite broad.¹³⁸ Unless otherwise provided by law, questions of "law" are for the courts, questions of "fact" for the agency, reviewable by the courts only when "unsupported by substantial evidence,"¹³⁹ or lacking a rational basis.¹⁴⁰ Professor Jaffe defines a finding of fact as "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect."¹⁴¹ If this test were strictly applied, there would be little agency decision-making that could withstand characterization as questions of law or mixed questions of law and fact, both of which are within a court's competence to decide.¹⁴² Jaffe argues that, even though many agency decisions are not findings of fact under his definition, "the legislature in realizing its [statutory] purposes has chosen to work through an administrative agency, and so (presumptively, as we have said) to

¹³⁷ See, e.g., *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970) (construction of expressway enjoined because part of structure was a "dike" which required specific congressional approval under the statute).

¹³⁸ Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1970):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably denied; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

There are, of course, instances where this standard is made inapplicable to agency action by, for example, a more restrictive statutory provision for review. See generally 4 K. DAVIS, *supra* note 23, §§ 28.09-16.

¹³⁹ 5 U.S.C. § 706(2) (E) (1970).

¹⁴⁰ See 4 K. DAVIS, *supra* note 23, § 30.05.

¹⁴¹ L. JAFFE, *supra* note 33, at 548 (emphasis omitted).

¹⁴² Very rarely is a finding purely a finding of fact under Jaffe's formulation; only in instances where Congress has provided a very specific definition of the public interest in a given context (for example, a prohibition against certain concentrations of pollutants in smoke emissions and a specification of a penalty) could an agency determination (for example, that there had been a violation of the prohibition) be considered purely a finding of fact.

confer on it some policy-making function," and that "[t]his discretion should normally be permitted to function short of the point where the court is *convinced* that the purpose of the statute is contradicted."¹⁴³ Congress in providing its characteristically broad mandates to the agencies and equally broad standards of judicial review, has left it to the agencies in the first instance to determine many norms, and to the courts to determine at least the outer limits of agency discretion in this regard. If the courts were to attempt to usurp the value-determining functions of the agencies totally, Congress might respond by delimiting much more specifically and narrowly the review or the courts' jurisdiction.¹⁴⁴

Judicial unwillingness to decide mixed questions of law and fact may rest on considerations less compelling than the ultimate power of Congress to restrict review to so-called constitutional and jurisdictional facts.¹⁴⁵ Professor Davis argues that "in numerous cases the Supreme Court has customarily classified questions of application—so-called 'mixed' questions of law and fact—as questions of 'fact' whenever it has seen fit to limit review; in other words, the Court has often used a practical or policy approach to the law-fact distinction and has often rejected the literal or analytical approach."¹⁴⁶ Lower federal courts are presumably even more likely to make result-oriented characterizations of questions as "legal" or "factual." Davis explores at length the reasons which might lead a court to make one characterization or the other. The main reason for not substituting judgment is a court's feeling that the question or value choice is "peculiarly within the agency's competence and not especially within the competence of the reviewing court."¹⁴⁷ In cases where judicial judgment has been sub-

¹⁴³ L. JAFFE, *supra* note 33, at 573 (emphasis in original). Jaffe does not deny that courts retain the *power* to review such decisions: "[t]he judgment of the expert may . . . be relevant to the decision, but it cannot by reason of its 'pure' quality, its specifically expert character, transform a question of law into a question of fact and so insulate the decision from legal judgment." Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 269 (1955).

¹⁴⁴ Cf. Military Selective Service Act of 1967, 50 U.S.C. APP. § 460(b)(3) (1970):

No judicial review shall be made of the classification of or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under [50 U.S.C. APP. § 462], after the registrant has responded either affirmatively or negatively to an order to report for induction . . . : *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

See generally H.M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312-40 (1953).

¹⁴⁵ See Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957).

¹⁴⁶ 4 K. DAVIS, *supra* note 23, § 30.01, at 190.

¹⁴⁷ *Id.* 191. In the environmental area, at least, some commentators feel the only effective means of vindicating the public interest is by widening radically the scope of judicial review so that courts may reach the merits. See, e.g., J. SAX, *DEFENDING THE ENVIRONMENT* 108-74 (1971); Sive, *Some Thoughts of an Environ-*

stituted, the reasons for the substitution usually are not, and, Davis suggests, "probably ought not to be articulated."¹⁴⁸ The judge may be familiar with an agency and trust—or distrust¹⁴⁹—it; he may sense injustice in a particular case which might lead to a closer examination of the record and occasionally to a decision on the merits; he may be unfamiliar with the technology, or the case may appear to be *sui generis* and the complaining party's grievance unappealing, and he may conclude that there are other cases more deserving of attention; he may disagree with the underlying policy he perceives in a decision;¹⁵⁰ he may feel the agency should be left alone while it explores an undeveloped area within its policymaking competence; or he may be influenced by a number of other factors.¹⁵¹

Courts, then, have the power to substitute their judgment for the agency's in making value choices. They have not, however, done so in most of the cases considered in this Comment;¹⁵² rather, they have used less drastic means calculated not to deprive the agencies of their power to generate policy but to influence its exercise indirectly.¹⁵³ A court's decision requiring of an agency the most scrupulous adherence to procedure and liberally construing provisions investing the agency discretion to grant procedural privileges may of course suggest to the agency that it alter its decision on the merits lest the court be moved to reverse on a subsequent appeal.¹⁵⁴ A court may believe the agency has inad-

mental Lawyer in the Wilderness of Administrative Law, 70 COLUM. L. REV. 612 (1970); Rogers & Hellegers, Book Review, 119 U. PA. L. REV. 1080 (1971). The Second Circuit has rejected Sive's proposal for expanding the standard of review. *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971).

¹⁴⁸ 4 K. DAVIS, *supra* note 23, § 30.08, at 233. In recent cases involving the FCC, the D.C. Circuit has been less than reticent in stating its reasons for differing. *See, e.g., Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 405 U.S. 953 (1972) (No. 71-864); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

¹⁴⁹ The frequency of reversal of FCC decisions recently by the D.C. Circuit suggests something less than complete faith in the Commission's policies and fairness. *Cf., e.g.,* notes 408-11 *infra* & accompanying text.

¹⁵⁰ *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91 (1953): "Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the [organic] statute and did not base its conclusion on matters within its own special competence, it is for us to determine what the governing principle is."

¹⁵¹ *See* 4 K. DAVIS, *supra* note 23, § 30.08 (1958 & Supp. 1970).

¹⁵² Perhaps the closest a court has come to taking a case away from an agency in the cases considered in this Comment was the D.C. Circuit's disposition of the second *United Church of Christ* appeal. *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *see* notes 426-36 *infra* & accompanying text. *See also Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 405 U.S. 953 (1972) (No. 71-864).

¹⁵³ Thus, Judge Kaufman, writing of the *Scenic Hudson* case, notes 768-84 *infra* & accompanying text, speaks of "[p]ulling out many of the weapons in the arsenal of judicial review that permit a court to skirt the question whether the Federal Power Commission was right or wrong." Kaufman, *supra* note 16, at 92.

¹⁵⁴ The Second Circuit in the second appeal of *Scenic Hudson* summarized the copious record compiled from the hearing on remand and the concessions made to the environmentalists, recited the customary language dealing with review of questions of fact, and upheld the FPC's decision. The concessions did substantially reduce

vertently or deliberately ignored information relevant to its decision and that enforcing a procedural requirement—such as the impact statement prescribed by the NEPA¹⁵⁵ or a public interest group's intervention in a proceeding—is the only viable means of informing the agency. Finally, a court may wish to widen the scope of public participation in order to force the agency to articulate the logic of its value choices in the record in response to arguments and data introduced by the public participant. The record, thus augmented, would facilitate judicial review of agency policymaking.

2. Public Interest Groups

If Congress and the courts have little present inclination to impose new values, or priorities among values already held, upon agency decisionmakers, members of the general public seem to have little power to do so. One of the most often repeated criticisms of agencies is that there is little citizen involvement in decisionmaking.¹⁵⁶ In terms of the due-process-equilibrium model, the criticism is that a proper equilibrium has not been established because certain interests affected by the decisions are not represented before the decisionmaker, who, whether or not his values would permit a sympathetic consideration of those interests if they were represented, gives them little or no consideration in fact. In theory, an office within the agency, such as the Atomic Safety and Licensing Board of the AEC¹⁵⁷ or the office of complaint counsel in the FTC¹⁵⁸ is usually supposed to represent the broader, more general interests of the public not represented by the regulated interests. Often these offices must compromise competing policy positions according to articulated or unarticulated agency priorities, with the result that no one position is argued to the fullest. Full exploration of the information that might be adduced to support each competing policy position, or, indeed, the very knowledge that some problems and policy positions exist at all, is often limited by lack of investigatory resources.¹⁵⁹ Consideration of some policy positions might be foreclosed altogether by an agency's priorities or its conception of its jurisdiction.¹⁶⁰ Some policy positions favorable to certain parties, then, are likely to be ignored unless articulated by independent spokesmen skilled in the legal argumentation and factual presentation that are at the heart of administrative decisionmaking.

the visual impact of the project on the landscape. See *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971); notes 777, 806-08 *infra* & accompanying text.

¹⁵⁵ See note 136 *supra*.

¹⁵⁶ See note 18 *supra*.

¹⁵⁷ See notes 825-42 *infra* & accompanying text.

¹⁵⁸ See notes 656-57, 685-86 *infra* & accompanying text.

¹⁵⁹ See note 24 *supra* & accompanying text.

¹⁶⁰ See, e.g., notes 893-900 *infra* & accompanying text.

Public interest groups, so termed largely as a matter of convenience, attempt to serve as such spokesmen. They serve the function of what may be called "public interest representation" before agencies, that is, *representation of an otherwise inadequately represented policy position (which may or may not be factually supported or easily susceptible of factual support) formulated to promote an interest which will be affected by the decision to be made.* By that representation, they enable the agency to make a more informed, fuller consideration of the problem before it, which is, in terms of the due-process-equilibrium model,¹⁶¹ more in the public interest. Two qualifications should be noted. First, the function of public interest representation may be served by others than those usually identified as "public interest groups." An individual might attempt to serve such a function; for example, a recent law school graduate has made several attempts to initiate or intervene in FCC proceedings.¹⁶² The function might be served by a labor union,¹⁶³ a trade association,¹⁶⁴ or a competitor.¹⁶⁵ Second, the concept of an "interest" is as broad or narrow as agencies, courts, and Congress choose to make it in any given case. Individuals and groups may be said to possess numerous narrowly defined interests, many of them competing or conflicting: everyone, for example, presumably has an interest, in the broad sense, in avoiding food poisoning, but a hypochondriac might go to great lengths to maintain a "proper" diet whereas a welfare recipient might get only what food stamps could provide. This Comment speaks of interests in the broader, more abstract sense—for example, the interest of the public in general in clean air—and seeks to distinguish such abstract interests as much as possible from policy positions calculated to advance these interests in a specific factual context. Thus, the interests in clean air might be advanced by a number of alternative policy positions presented by a number of different spokesmen in a given agency context.¹⁶⁶

Under the above definition, a public interest group need not have an interest that would confer standing to obtain judicial review.¹⁶⁷ It need only effectively represent a policy position calculated to advance such an interest. Under this theory, intervention, at least in a non-technical sense of being allowed to present information and policy arguments, should be granted any group which offered expert representation of a relevant policy position not otherwise represented.¹⁶⁸

¹⁶¹ See notes 129-33 *supra* & accompanying text.

¹⁶² See notes 389-400 *infra* & accompanying text.

¹⁶³ See notes 516, 682-90, 845 *infra* & accompanying text.

¹⁶⁴ See notes 650, 662-63 *infra* & accompanying text.

¹⁶⁵ See notes 351-54, 750-51 *infra* & accompanying text. But see notes 396-98 *infra* & accompanying text.

¹⁶⁶ Cf. text preceding note 681 *infra*.

¹⁶⁷ See notes 49-84 *supra* & accompanying text.

¹⁶⁸ The intervention granted state and local governments and other government agencies is justified by this rationale, although political accommodation may also play a part. Intervention by competitors or industry advisory committees is sometimes

What accounts for the relatively recent emergence of groups to present interests which were previously inadequately represented, and what interests are these groups likely to represent? The very existence of such groups is difficult to explain under orthodox theories of such special interest groups as labor unions, trade or industrial associations, and professional associations.¹⁶⁹ Mancur Olson has argued that the latter resort to collective action—lobbying, contributions to political campaigns, litigation, advertising, and so forth—only where the individual benefit accruing to each member of the group outweighs the individual cost of supporting the collective action, and then, except in the case of very small groups where social disapprobation effectively prevents failure to contribute one's share of the cost, only where there is some additional incentive or coercion, quite apart from the achievement or failure to achieve the collective goal.¹⁷⁰ The first requisite of *collective action*—that the benefit to the individual outweigh or at least equal the cost—would seem to be lacking for most public interest groups. They often assert interests, such as control of radioactive waste,¹⁷¹ conservation,¹⁷² preservation of historic landmarks or scenic areas,¹⁷³ prevention of deceptive or misleading advertising,¹⁷⁴ fair representation of controversial subjects in the broadcast media,¹⁷⁵ and protection from harmful effects of DDT,¹⁷⁶ that are shared by persons outside the group, often by every member of a large class or geographic area affected by the agency decision. The benefit their members would derive if their objectives were achieved would not, in monetary terms, repay the requisite expenditure of time, effort, and funds. There is perhaps a satisfaction derived by the members that would make up the deficit in the cost-benefit equation: the personal satisfaction or sense of morality that is derived from participation in what the individual feels is a just cause. That very questionable assumption—that an enhanced sense of moral rectitude can sufficiently compensate for the

granted without regard to the interest represented, on the ground that the competitor or committee possesses special expertise or access to data useful to the agency in making a full consideration of the issues. See, e.g., notes 750-53 *infra* & accompanying text.

¹⁶⁹ See generally H. ECKSTEIN, *PRESSURE GROUP POLITICS* (1960); S. FINER, *ANONYMOUS EMPIRE: A STUDY OF THE LOBBY IN GREAT BRITAIN* (1966).

¹⁷⁰ In large groups, the additional coercion or incentive is required by the tendency of individuals to accept the benefit without paying their share of the cost: the pressure labor unions are allowed to exert on employees to maintain the integrity of bargaining units is a good example. See M. OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

¹⁷¹ See *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970).

¹⁷² See *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

¹⁷³ See *id.*

¹⁷⁴ See *Campbell Soup Co.*, [1967-1970 Transfer Binder] *TRADE REG. REP.* ¶19,261 (FTC 1970), *appeal filed sub nom. SOUP, Inc. v. FTC*, No. 24,476, D.C. Cir., July 24, 1970; see notes 598-608 *infra* & accompanying text.

¹⁷⁵ See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

¹⁷⁶ See *Environmental Defense Fund v. HEW*, 428 F.2d 1083 (D.C. Cir. 1970).

insufficiency in monetary terms of a benefit derived through collective actions—is perhaps more easily made in light of the fact that some public interest groups do not bear the financial cost of their activities themselves.¹⁷⁷

This circumstance, viewed in one light, tends to help balance the cost-benefit equation; viewed in another, it raises serious questions of the reliability of the representation of the group's interest. For example, the work of a major public interest law firm, the Center for Law and Social Policy in Washington, D.C., has been subsidized by major foundations.¹⁷⁸ Many of the groups represented by the Center could not independently provide themselves with the sort of expert representation required in agency proceedings. To some extent, then, the Center not only represents these groups, but in doing so tends to define their goals and, perhaps, their structure and internal organization as well, if only in the discretion it exercises in choosing the types of cases it will take, what strategies will be used, what remedies sought, what compromises accepted.¹⁷⁹ The Center and other institutions like it decide, in effect, what interests it is most in the public interest to represent. Critics have suggested that some of these decisions reflect a bias against problems of the poor and in favor of interests, such as those of the consumer and the environmentalist, whose problems are arguably more susceptible to solution through the political process.¹⁸⁰

There is, at the very least, a danger that a public interest law firm's concept of its client group's interest will not accurately reflect that interest, to the extent that the client group is not well organized in its own right, does not have well-established policies, does not have a working knowledge of the administrative process, is not able to draw upon its own internal information and expertise to support its case, or, if unsatisfied with the firm's presentation of its interest, is unable to afford other representation. One measure of the integrity and legitimacy of a group, and hence its ability to curb misrepresentation of its interest, is its ability to engage in significant collective action (short of presenting its own case before an agency) to promote its interest unassisted. Those groups which do not engage in such action are less able to prevent misrepresentation than those, like the Sierra Club,¹⁸¹ Consumers Union,¹⁸² and Common

177 For example, in *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), the conservation group was "heavily financed by a public spirited citizen." Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. Rev. 1033, 1044 (1968).

178 See Halpern & Cunningham, *supra* note 13, at 1104. For other general accounts of the practice of public interest law, see Berlin, Roisman & Kessler, *supra* note 13; Cahn & Cahn, *supra* note 13; Comment, *supra* note 13.

179 See Halpern & Cunningham, *supra* note 13, at 1107-10; cf. *NAACP v. Button*, 371 U.S. 415, 462-63 (1963) (Harlan, J., dissenting).

180 Halpern & Cunningham, *supra* note 13, at 1107.

181 See note 788 *infra*.

182 See note 678 *infra*.

Cause,¹⁸³ which do.

The problem of misrepresentation of the interest asserted is not limited to those groups which do not engage in other significant collective action unassisted. It is present when a group represents two or more potentially competing interests. Such groups are not ordinarily thought of as public interest groups, although they are allowed access to administrative proceedings to present information not otherwise easily available to an agency, and in that sense further the public interest. Examples include large trade or professional organizations,¹⁸⁴ competitors allowed to intervene in a role analogous to that of the "private attorneys general,"¹⁸⁵ and large labor unions that may claim to represent their members' interest as consumers or environmentalists.¹⁸⁶ Similarly, it is perhaps too easily assumed that municipalities or other governmental units, which are often allowed to intervene in certain proceedings as of right,¹⁸⁷ will accurately reflect the balance of the competing interests within their jurisdictions.¹⁸⁸ Finally, the problem of misrepresentation of the asserted interest induced by competing interests may be present in groups like that in *Polisades Citizens Association v. CAB*,¹⁸⁹ whose members' interest in environmental effects of an agency decision may be difficult to distinguish from their individual interests as property owners.

¹⁸³ But cf. Schrag, *Common Cause: New Paths for WASP Elites*, 2 SOCIAL POLICY, Nov.-Dec. 1971, at 29, 31:

Common Cause was to be a membership organization relying not on a few large donors but on the fifteen-dollar annual fee that each of a hundred thousand concerned citizens would contribute. . . . Common Cause suggested that the thing called the Public Interest is distinguishable (to certain people) from particular interests; the Public Interest, moreover, was more noble than particular interests and, almost by definition, could be articulated only by those who have no overriding special interests to defend . . . , who were already sufficiently secure or established (or saintly?) to be incorruptible and selfless. Such people must necessarily be individuals who place themselves into an "American" tradition that is beyond class or race or time, beyond even the memory of having made it. It is only the Establishment which can deny the possibility that the Public Interest is simply an arrogant misunderstanding of its private concerns, however selfless it may regard them. It is only the Establishment which can toss out the word "we" as if it meant everybody, as if there were no "us" and "them." The crisis (real or, again, imagined) which gave impetus to Common Cause is the breakdown of that "we"; it is the dawning realization that when someone says "we" as if it did mean everybody there is a cacophony of count-me-outs.

¹⁸⁴ See notes 650, 662-63 *infra* & accompanying text.

¹⁸⁵ See, e.g., notes 351-54 *infra* & accompanying text.

¹⁸⁶ See notes 516, 682-90, 845 *infra* & accompanying text.

¹⁸⁷ See note 734 *infra* & accompanying text.

¹⁸⁸ In *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969), a citizens group intervened but was unable to present its case against the sale of power facilities to a private utility which had been approved by referendum. The case presents a striking example of dissent from the prevailing consensus of the community, which might have altered the Commission's view of the equities if a hearing had been allowed.

¹⁸⁹ 420 F.2d 183 (D.C. Cir. 1969). See notes 533-47 *infra* & accompanying text.

D. *Considerations Influencing the Form of Participation*

What considerations, then, beyond those outlined by Shapiro for permissive intervention before courts should govern agency discretion in formulating its intervention policy? That there are many types of administrative proceedings and that within each type the effect of a decision may be limited strictly to a single party or may extend to an entire segment of the national economy suggest a similar variety in forms intervention might take, depending upon the type of proceeding, the intervenor's interest, and his potential contribution.

Three broad types of administrative proceedings are exemplified in the analyses below of the individual agencies: proceedings which formulate rules of general applicability; proceedings which allocate resources or privileges; and proceedings which enforce prohibitions created by statute. Of course, these areas often overlap. An FCC license renewal hearing, for example, may combine all three types. Before a broadcast license may be reallocated, there may be charges of past violations of the fairness doctrine which would raise the possibility of enforcing sanctions, or there may be complaints relating to the quality of programming or objections to the frequency or fairness of advertising which might raise novel policy questions more commonly considered in the rulemaking context. Enforcement proceedings in the FTC are sometimes used by the agency to establish new rules applicable throughout an industry.¹⁹⁰ Although these examples point out the danger in analyzing proceedings according to their form rather than the issues they consider,¹⁹¹ some general observations may be made of each of the types of proceedings mentioned above.

The need for broad public participation, including participation by public interest groups, is most obvious in agency rulemaking.¹⁹² Rulemaking proceedings setting future standards or policies are "legislative" in the sense that many interests are potentially affected, many inter-related issues involved, and a variety of solutions possible. Rulemaking should be modeled on the political process to the fullest extent practicable. In areas where rulemaking is currently employed, the interests of large segments of the public, and particularly the poor, are said to be inadequately represented: there is not enough investigation of the effects of contemplated rules on these interests initiated by the agencies themselves, there is little coordination of the efforts of the unrepresented groups to participate, and notice of contemplated rulemaking is inadequate. Indeed, matters relating to "public property, loans, grants, bene-

¹⁹⁰ Problems unique to enforcement proceedings are treated below in the context of the FTC.

¹⁹¹ See Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970).

¹⁹² Formal rulemaking is governed by the Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970).

fits or contracts"¹⁹³—matters most likely to affect the poor—are specifically excepted from the requirements of the APA for notice and participation "through the submission of written data, views, or arguments with or without opportunity for oral presentation"¹⁹⁴ or through "the right to petition for the issuance, amendment, or repeal of a rule."¹⁹⁵ It has been suggested that these exceptions, and those for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice"¹⁹⁶ be eliminated or modified.¹⁹⁷ Several commentators have suggested that agencies employ their rule-making authority much more broadly than they now do,¹⁹⁸ and several public interest groups have attempted to initiate such rulemaking with varying degrees of success.¹⁹⁹ *Moss v. CAB*,²⁰⁰ despite the narrowness

¹⁹³ *Id.*

¹⁹⁴ *Id.* § 553(c).

¹⁹⁵ *Id.* § 553(e). For analysis and criticism of these exceptions, see Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. Pa. L. Rev. 540 (1970).

¹⁹⁶ 5 U.S.C. § 553(b) (A) (1970).

¹⁹⁷ See, e.g., Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101 (1971); Bonfield, *supra* note 18.

¹⁹⁸ See, e.g., Clagett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51; Robinson, *supra* note 191; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Agency Policy*, 78 HARV. L. REV. 921 (1965). For an example of the use of rule-making to expedite the hearing process, see note 917 *infra* & accompanying text.

¹⁹⁹ On June 8, 1971, the Project for Corporate Responsibility and the Natural Resources Defense Council filed a petition before the Securities and Exchange Commission for rulemaking proceedings "in order to require more adequate disclosures of present and potential environmental effects of registrants' activities" in keeping with the mandate of the NEPA, and to "modify its forms for registration of securities under the Securities Act of 1933 and its current and periodic report forms to require more adequate disclosures by registrants with respect to their compliance with the requirements and policies of the federal Equal Employment Opportunity Act and Executive Order 11246 relating to discriminatory hiring practices on the part of federal contractors." Petition of Project for Corporate Responsibility and Natural Resources Defense Council 1, June 7, 1971, copy on file in Biddle Law Library, Univ. of Pa. Law School. Concerning the environmental issue, Chairman Casey of the SEC subsequently responded:

To go further to the extent suggested in the petition . . . raises difficult questions concerning the purpose and function of the Securities and Exchange Commission. Traditionally, we have viewed our function in the disclosure area . . . to be that of requiring inclusion of information which will enable a prudent investor to make an intelligent judgment as to the merits of a security considered in economic terms. . . .

. . . . We recognize that Section 102 of the [NEPA] may well have broadened our disclosure obligations but we are still seeking to determine the extent to which this section calls for a major reorientation of the mandate given us by Congress in 1933 and 1934.

Letter from Chairman Casey to Representative John Dingell, Aug. 6, 1971, copy on file in Biddle Law Library, Univ. of Pa. Law School. As of Sept. 27, 1971, the Commission had made no official reply to petitioners. Interview with Roger S. Foster of the Center for Law and Social Policy, in Washington, D.C., Sept. 27, 1971. See Schwartz, *The Public Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419 (1971). Another attempt—before the FCC—to initiate rulemaking met with more success. See note 338 *infra*.

²⁰⁰ 430 F.2d 891 (D.C. Cir. 1970). See notes 495-509 *infra* & accompanying text.

of its technical holding, indicates a growing apprehensiveness on the part of courts that the intricacies of summary rulemaking procedures may be used to foreclose comment or protest by members of the public. *Calvert Cliffs' Coordinating Committee v. AEC*²⁰¹ reveals a kindred willingness to scrutinize rules intended to implement national policy as articulated by the NEPA. In general, however, agency utilization of and public participation in, rulemaking have been limited.²⁰² The scope of participation is narrower than in adjudicative proceedings, particularly where notice and a hearing are not mandatory, and the standard of judicial review of rulemaking under section 4 of the APA appears even less probing than that of review of adjudicative proceedings.²⁰³

While, under the APA, any person may "petition for the issuance, amendment, or repeal of a rule,"²⁰⁴ the choice between rulemaking and adjudication is, of course, for the agency, and not those affected by the decisions, to make.²⁰⁵ In some instances, however, a hearing is required where initiated by a complaining party, and this normally affects the complainant's intervention rights.²⁰⁶ Greater use of rulemaking by agencies might diminish the procedural rights and scope of judicial review now available to public interest groups in the adjudicative context. On the other hand, public interest groups are usually better prepared to address the broad questions of policy upon which rulemaking proceedings often focus than to marshal the expertise and factual data upon which adjudicative proceedings tend to focus.²⁰⁷ Statements of opinion by public interest groups, even if unsupported by expert testimony and factual data, are more appropriate to rulemaking because of its more "legislative" format. "The failure of many agencies to rely upon informal rulemaking proceedings rather than trial-type hearings to decide general policies is itself a significant cause for public intervention in trial-type proceedings."²⁰⁸ The danger that regulated interests will overwhelm both the agency and public participants with finely focused expertise that is both difficult to counter and obfuscative of broader policy considerations, is perhaps diminished when decisions involving broader questions of policy are made in the rulemaking context.²⁰⁹ The

²⁰¹ 449 F.2d 1109 (D.C. Cir. 1971).

²⁰² Cf. note 18 *supra* & accompanying text.

²⁰³ See Robinson, *supra* note 191, at 488 n.15.

²⁰⁴ 5 U.S.C. § 553(e) (1970).

²⁰⁵ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

²⁰⁶ See Shapiro, *supra* note 37, at 726-29.

²⁰⁷ SOUP's lack of success in the *Firestone* case may be an example. See notes 658-81 *infra* & accompanying text.

²⁰⁸ Gellhorn, *supra* note 18, at 378.

²⁰⁹ In *Udall v. FPC*, 387 U.S. 428, 436 (1967), for example, the decision below, which focused on whether the purposes of a proposed hydroelectric power project would be better served by private or federal development, was reversed for failure to consider the threshold question whether any project should be constructed.

regulated industries, furthermore, have the resources to endure an extended adjudicative proceeding.

Beyond these areas of agency jurisdiction subject to the notice and public participation provisions of either rulemaking or formal adjudication, lies the vast realm of informal agency action which has long been a sacred preserve virtually unviolated by public scrutiny or judicial intervention.²¹⁰ The reluctance of courts to entertain appeals from agency actions for which there is no hearing record or other articulation of policy may in many instances indicate a sound deference to the agency's control over its own resources and priorities, but it has become strikingly clear that greater disclosure of and public participation in informal agency decisionmaking is necessary to secure confidence in the administrative process.²¹¹ While the need for informal adjudication and policymaking is uncontested, openness and the structuring of discretion can operate to minimize the dangers of covert arbitrariness, bias, and inconsistency.²¹² The due process clause of the Constitution demands some minima of procedure and articulated standards of decision to ensure fairness in informal adjudications.²¹³ Beyond this "ultimate source" of power to compel formalization of procedure and greater articulation of policy, the governing statutes often can be read to allow review of informal agency action and to compel the institution of more formal proceedings.²¹⁴ Aided by the presumption of reviewability,²¹⁵ courts have expanded the outer periphery of effective judicial review by closely examining administrative inaction or delay²¹⁶ and by assuming a pragmatic approach to the major exception to reviewability, the committed-to-agency-discretion doctrine.²¹⁷

²¹⁰ See Clagett, *supra* note 198, at 55.

²¹¹ See Gardner, *The Procedures By Which Informal Action Is Taken*, reprinted in *Hearings on S. 1177 & H.R. 10835 Before the Subcomm. on Executive Reorganization & Government Research of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 233 (1971).

²¹² See K. DAVIS, *DISCRETIONARY JUSTICE* 97-120 (1969).

²¹³ See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

²¹⁴ See Clagett, *supra* note 198, at 66; *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971). But cf. *Nor-Am Agricultural Products, Inc. v. Hardin*, 435 F.2d 1151 (7th Cir. 1970).

²¹⁵ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967).

²¹⁶ See *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Goldman, Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968).

²¹⁷ See 5 U.S.C. § 701(a) (1970). One influential article has suggested that reviewability of discretionary agency action be determined by analyzing in each case the interest of the agency in informal proceedings, the burden on the courts of increased review, and the interests of the affected individuals. Saferstein, *supra* note 33, at 371. See *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 666-67 (D.C. Cir. 1970). By examining the scope of an agency's authority and the congressional scheme, reviewing courts may determine the extent of agency discretion, the expertise necessary to decision, the managerial nature of the agency, the usefulness of informal proceedings, the effectiveness of review, and the desirability of expeditious operation of the agency.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*,²¹⁸ the Supreme Court has recently attempted to define the scope of review of informal agency actions. The Court found that section 10(e) of the APA²¹⁹ demands thorough, searching review to determine whether an agency has exceeded the scope of its authority, whether there has been an abuse of discretion, and whether procedural requirements have been observed by the agency.²²⁰ Though the Court refused to impose a requirement that formal findings and statements of reasons accompany informal decisions,²²¹ reviewing courts were instructed to examine critically "the full administrative record," treating retrospective findings with caution, and were authorized, where there are no formal findings and where additional explanation is necessary to make judicial review effective, to "require the administrative officials who participated in the decision to give testimony explaining their action."²²² While the Court refused to require contemporaneous findings for informal agency decisions, *Overton Park* would nevertheless appear to lend impetus to increased formalization of informal processes.²²³

Adjudicative allocation proceedings figure prominently in the developments within the agencies considered below. In general, they involve the grant of some privilege—a license to broadcast, to build a hydroelectric project, a pipeline, or nuclear power plant, or to provide air transportation for a given locality—that may be enormously profitable to the recipient but potentially harmful not only to his competitors but also to members of the public residing in the area affected by the license. Just as rulemaking sets standards or policies for the future, many of these allocation proceedings will affect a multitude of interests for an extended period of time. The immediate impact of the allocation of the resource or privilege heightens the desire of affected interests to participate. On the other hand, intervenors may have less of a role to fulfill in trial-type proceedings with an "individualized impact" on the regulated interest.²²⁴

See Saferstein, *supra* note 33, at 377-95. After considering these factors, courts should also inquire into the possibilities of limited review of separable issues. See *id.* 395-96. See also Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967).

²¹⁸ 401 U.S. 402 (1971). See *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 315-25 (1971).

²¹⁹ 5 U.S.C. § 706 (1970).

²²⁰ 401 U.S. at 415-17. To find an abuse of discretion, reviewing courts "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416.

²²¹ *Id.* at 417.

²²² *Id.* at 420. The holding was thus an explicit limitation on *United States v. Morgan*, 313 U.S. 409 (1941), which prohibited courts from inquiring into the mental processes of administrative decisionmakers. *Id.*

²²³ See Clagett, *supra* note 198, at 62-63; *The Supreme Court, 1970 Term, supra* note 218, at 321-22.

²²⁴ Cf. Gellhorn, *supra* note 18, at 379-80.

Such proceedings already attract a number of parties, and hence procedures have been developed which attempt to accommodate them. The CAB in particular has developed relatively refined rules regarding intervention which attempt to adjust the degree of permitted participation to the intensity of the applicant's interest and the applicant's ability to contribute information relevant to specific issues²²⁵ or the overall decision to be made. These rules are analyzed extensively below, and an attempt is made to establish more precisely standards that should guide the Board's discretion in granting procedural privileges to those whose interest does not seem sufficient to entitle them to intervention with all the rights of original parties.²²⁶ This flexible accommodation is desirable, especially since party status is not normally necessary to the right to appeal an adverse decision.²²⁷ The proposed addition to the CAB's rule on limited intervention is not aimed at limiting the Board's discretion, but rather at encouraging the Board to articulate its reasoning in particular cases more fully. Shapiro's proposed changes to rule 24 of the Federal Rules of Civil Procedure, in contrast, are aimed at broadening a court's authority to grant permissive intervention. Though most agencies already have such authority, they have not articulated standards as precise as those suggested by Shapiro and those adopted by the CAB.

If an applicant for intervention possesses special expertise or information, including opinion and general legal theories, not otherwise available to the decisionmaker, he should be allowed whatever procedural privileges he needs, to present that information effectively. The possible range of privileges includes the submission of written statements and factual exhibits,²²⁸ oral presentations before the hearing examiner or the full commission,²²⁹ submission of briefs,²³⁰ the privilege to comment on the record and the hearing examiner's findings,²³¹ the privilege to present witnesses and to cross-examine,²³² and the use of subpoena and discovery powers.²³³ Often, the grant of privileges much less extensive than those granted full parties would be sufficient to allow an applicant to present its information effectively. Rules which limit certain privileges to full parties seem undesirable, to the extent that the privilege in question might serve the purposes of limited intervention and to the extent it might induce applicants to insist on full party status.

²²⁵ See notes 658-63 *infra* & accompanying text.

²²⁶ See notes 510-32, 567-80 *infra* & accompanying text.

²²⁷ Cf. Shapiro, *supra* note 37, at 767. But cf. notes 682-707, 746-55 *infra* & accompanying text.

²²⁸ See note 530 *infra* & accompanying text.

²²⁹ See note 527 *infra* & accompanying text.

²³⁰ See note 530 *infra* & accompanying text.

²³¹ See note 529 *infra* & accompanying text.

²³² See note 662 *infra* & accompanying text.

²³³ See notes 616-22, 661 *infra* & accompanying text.

A case like *Palisades Citizens Association v. CAB*²³⁴ demonstrates the wise use of agency discretion in granting privileges sufficient to convey the proffered information.

Quite apart from a petitioning intervenor's ability to present information, another general consideration is the effect a decision may have on his interest. This consideration may be more binding on courts than agencies,²³⁵ but *Welfare Rights* seemed to base the fundamental right to participate, for purposes of making effective the right of review, on the fact that the welfare recipients' interest fell within *Data Processing's* "zone of interests." Given the potential expansiveness of that zone, some agencies may well be forced to allow intervention where previously they had denied it on the ground that the interest asserted was too remote.²³⁶

Must any applicant who alleges an interest within that zone be allowed to participate, even if it appears that he could adduce no information relevant to the inquiry and that there may be more suitable representatives of the applicant's interest?²³⁷ The question is far from academic: in the highly technical context of AEC proceedings, for example, it has been advocated that intervenors adopt tactics of delay and outright confrontation rather than undertake the costly burden of rebutting the evidence introduced in support of license applications.²³⁸ If one subscribes to the most pessimistic view of the current state of affairs within the agencies generally,²³⁹ perhaps this latter sort of participation—highly political and often disruptive—serves the arguably valid function of dramatizing administrative failings in order to initiate changes in agency policy, staff, and attitude.²⁴⁰ There is the possibility, however, that intervention by a citizens' group might be abused. A conspiracy by members of a regulated industry to employ the privilege of intervention as part of a scheme to drive a competitor out of business

²³⁴ 420 F.2d 188 (D.C. Cir. 1969). See notes 533-66 *infra* & accompanying text.

²³⁵ See note 114 *supra*.

²³⁶ Reasonable geographic proximity, for example, remains a general requirement in certain proceedings before the AEC, CAB, and FCC. The fact that petitioner resided outside the area arguably affected by a proposed site has been a ground articulated by the AEC in denying a petition to intervene. See notes 869-71 *infra* & accompanying text. Similarly, "off-line" cities or cities alleging non-economic interests do not have a clear right to intervene under present CAB policy, see notes 520-23 *infra* & accompanying text, and petitioners challenging broadcast license renewals must reside within the service area. See notes 389-95 *infra* & accompanying text.

²³⁷ The FCC's treatment of attempts to intervene by an individual, Anthony Martin-Trigona, illustrates the problems that might confront an individual or a little-known, poorly-financed group. See notes 389-400 *infra* & accompanying text.

²³⁸ See note 877 *infra* & accompanying text. Gellhorn, *supra* note 18, at 28-29, minimizes the significance of this point.

²³⁹ See notes 17-31 *supra* & accompanying text.

²⁴⁰ The agency itself might encourage such participation in certain instances where it would prefer not to advocate a new policy position for fear of more active initial industry opposition. "Affirmative disclosure," originally proposed by an intervenor, is now proposed as a remedy by the FTC itself. See note 669 *infra* & accompanying text.

may violate the antitrust laws.²⁴¹ In the recent case of *California Motor Transport Co. v. Trucking Unlimited*,²⁴² the Supreme Court found that, while "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of . . . federal agencies and courts to advocate their causes and points of view,"²⁴³ "[a] combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts [and] to defeat that right by massive, concerted, and purposeful activities of the group"²⁴⁴ violates the Sherman Act. Concerted efforts to influence legislation and law enforcement²⁴⁵ or perhaps "agency action on broad policy issues of a quasi-political nature"²⁴⁶ may be given wide latitude as protected political expression, but in an adjudicatory forum "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."²⁴⁷ *NAACP v. Button*²⁴⁸ would appear to protect the right to advocate vigorously a course of corporate litigation strategy, except where "substantial regulatory interest, in the form of substantive evils flowing from [the cooperative] activities"²⁴⁹ can be shown. Any special interest group that systematically engages in a program of opposing a regulated industry by repeatedly and unmeritoriously invoking the legal machinery of the government's adjudicative processes, so as to delay or impede substantially the easy access to those procedures, may be enjoined or perhaps assessed for consequential damage.

The adoption of a dilatory or obstructionist strategy may not be warranted;²⁵⁰ the more constructive approach would seem to be to seek greater flexibility in the procedural rules governing intervention and to provide the public interest intervenor with the financial means to make an effective case, rather than simply to announce a presence and to present a general legal argument.²⁵¹ A number of public interest

²⁴¹ See, e.g., *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J.), *aff'd dismissed sub nom. American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953); *United States v. Association of Am. R. Rs.*, 4 F.R.D. 510 (D. Neb. 1945).

²⁴² 404 U.S. 508 (1972).

²⁴³ *Id.* at 510-11.

²⁴⁴ *Id.* at 515.

²⁴⁵ See *UMW v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

²⁴⁶ Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 356 (1967).

²⁴⁷ 404 U.S. at 513. See Note, *The Brakes Fail on the Noerr Doctrine*, 57 CALIF. L. REV. 519 (1969).

²⁴⁸ 371 U.S. 415 (1963).

²⁴⁹ *Id.* at 444. Cf. Note, *supra* note 247, at 536-39.

²⁵⁰ Courts may be inclined in the future to impose more responsibility on the agencies to explore certain issues. Cf. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, No. 71-1732 (D.C. Cir. Oct. 5, 1971).

²⁵¹ See notes 285-316 *infra* & accompanying text.

organizations have sponsored a set of model intervention rules which, although admirable in their emphasis on broader public participation, fail to distinguish various types of agency proceedings and therefore provide a uniform standard for all.²⁵²

Agencies should, first of all, attempt to improve the mechanisms whereby notice of contemplated agency activity is given to persons potentially affected.²⁵³ At present, notice is not calculated to reach all affected members of the public, is often couched in general terms which mean little to the inexpert,²⁵⁴ and is not given in time to allow outsiders to prepare a well-documented case in opposition to the contemplated action.²⁵⁵ A related problem is the timeliness of an application for intervention. In the past, courts have upheld denials of intervention for want of a timely application, in the interest of preventing delay.²⁵⁶ The agencies generally have discretion to grant extensions,²⁵⁷ which in some instances appears to have been exercised somewhat inconsistently²⁵⁸ and in others arbitrarily to deny an otherwise meritorious application.²⁵⁹ The frequently inadequate notice and the financial constraints under which public interest intervenors operate should be given much more consideration by agencies and courts in determining what constitutes good cause shown for failure to meet deadlines.

The denial of intervention or of any procedural privilege the intervenor asserts is necessary for a proper presentation of its case should be immediately appealable to an intermediate board of appeal (if the agency has established one²⁶⁰), to the full commission, and to a court. Stays of proceedings need not be granted in every such appeal.²⁶¹ Denials of intervention potentially affect the reliability of the determination of the issues,²⁶² and this consideration should outweigh the concern for preventing delay occasioned by such appeals.

The value of cross-examination has been questioned in some contexts, particularly where the testimony is of a highly technical nature which would seem to lend itself equally well to presentation through

²⁵² See note 18 *supra*.

²⁵³ Gellhorn, *supra* note 18, at 398-403.

²⁵⁴ See notes 420-21, 685 *infra* & accompanying text.

²⁵⁵ Cf. notes 876-92 *infra* & accompanying text.

²⁵⁶ See notes 412-16, 864-65 *infra* & accompanying text.

²⁵⁷ See, e.g., note 416 *infra* (FCC); 18 C.F.R. § 1.8(d) (1972) (FPC).

²⁵⁸ Compare *Transwestern Pipeline Co.*, 35 F.P.C. 334 (1966) (intervention denied, but applicant Dep't of Health, Education & Welfare allowed to file brief *amicus curiae*), with *Columbia Gulf Transmission Co.*, 35 F.P.C. 642 (1966) (applicant HEW allowed intervention in factually indistinguishable case).

²⁵⁹ See note 415 *infra* & accompanying text.

²⁶⁰ See generally Gellhorn & Larsen, *Interlocutory Appeal Procedures in Administrative Hearings*, 70 MICH. L. REV. 109 (1971).

²⁶¹ Cf. Shapiro, *supra* note 37, at 748-51, 762-63.

²⁶² See note 107 *supra* & accompanying text.

written statements and exhibits.²⁶³ On the other hand, cross-examination may be necessary to prevent broader issues from being obscured by a narrow focus on technical matters, to prevent factual inconsistencies from being buried in the record, and to bring out pro-industry orientation of expert witnesses or staff witnesses.²⁶⁴

Discovery of information in the possession of regulated interests or in the possession of the agency itself should be more widely available to the public interest intervenor. Possible prejudice to respondents in enforcement proceedings, protection of confidential information such as trade secrets or financial data not available to the investing public, and the possibility of harassing or unduly burdening the party subject to the order must, of course, be taken into account to limit the scope of discovery or to form protective orders. "Even though a public intervenor is frequently allowed to participate because of its particular information or expertise, discovery may be necessary in order for it to protect its position or complete its preparation."²⁶⁵ So long as the intervenor has raised and carefully framed issues relevant to the proceedings, liberal discovery privileges would facilitate the effective factual presentation that has too often been lacking in intervenors' appearances before agencies.²⁶⁶

The agency must, of course, have discretion to limit the issues considered in any given proceeding. Certain issues may properly be foreclosed as being outside the agency's jurisdiction, but there is a tendency on the part of Congress and the courts to widen agency jurisdiction.²⁶⁷ In areas within an agency's jurisdiction, the grant of intervention to address certain issues but not other closely related issues might be difficult to justify.²⁶⁸ Most of the cases, however, center either upon whether the issue sought to be raised falls within the agency's jurisdiction or upon whether an issue clearly relevant to the proceeding was explored fully enough. The degree of discretion an agency has to limit intervention to raise issues within its jurisdiction and arguably relevant to the proceeding awaits judicial clarification.²⁶⁹

A further problem which awaits explication is the extent to which an agency may exclude one applicant for intervention in favor of another which is more "representative" or appears better able to present information and expertise. In the *Palisades* case,²⁷⁰ for example, the

²⁶³ See text following note 559 *infra*; Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 95 (1971). See also Prettyman, *How to Try a Dispute Under Adjudication by an Administrative Agency*, 45 VA. L. REV. 179, 190 (1959).

²⁶⁴ Cf. note 886 *infra* & accompanying text.

²⁶⁵ Gellhorn, *supra* note 18, at 385.

²⁶⁶ See notes 616-22 *infra* & accompanying text.

²⁶⁷ See notes 135-55 *supra* & accompanying text; cf. note 199 *supra*.

²⁶⁸ See note 662 *infra* & accompanying text.

²⁶⁹ Cf. Comment, *supra* note 94, at 576-78.

²⁷⁰ See note 234 *supra*.

court seems to have assumed that another intervenor, the Department of Transportation, adequately represented the interests of the citizens' group so as to justify the denial of procedural privileges to that group. Would a similar assumption have been justified if a militant black power organization had sought to intervene independent of the National Welfare Rights Organization in *Welfare Rights*,²⁷¹ or an organization like the Ku Klux Klan had sought intervention independent of the church and the NAACP in *United Church of Christ*?²⁷² Finally, if agencies like the Consumer Protection Agency²⁷³ are established, to what extent will their participation preclude participation by public interest organizations?

Professor Ernest Gellhorn, to some extent reflecting Shapiro's suggested approach to permissive intervention in court actions,²⁷⁴ has recommended that agencies exercise the power to select the most appropriate intervenor by examining (1) the nature of the contested issues; (2) the intervenor's interest in the outcome; (3) the adequacy of representation of the intervenor's interest by existing parties; (4) the ability of the intervenor to represent its interest vigorously; and (5) the cost and delay occasioned by the intervention.²⁷⁵ Such criteria could also be employed to apportion procedural privileges among intervenors.²⁷⁶ The criterion requiring some demonstrable interest be advanced "serves to identify not only the contribution which the intervenor can make to the administrative hearing, but also the right of those who will be significantly affected by an agency's decision (even though the immediate, direct impact may not be significant or distinct) to be afforded a reasonable opportunity to be heard."²⁷⁷ This criterion, of course, finds its antecedents in the private-attorney-general concept, which looked to a party's interest as a barometer of the intensity and reliability of the arguments he would forward.²⁷⁸ Whether an interest is adequately represented by an agency depends in part upon the nature of the proceeding²⁷⁹ and upon the degree to which the agency is thought to be influenced by the regulated industry.²⁸⁰ Whether an intervenor is a "responsible and representative [group] eligible to intervene"²⁸¹ may turn on whether it has "by [its] activities and conduct . . . ex-

²⁷¹ See notes 94-113 *supra* & accompanying text; Comment, *supra* note 94, at 578-80.

²⁷² See notes 363-76 *infra* & accompanying text.

²⁷³ See notes 306-21 *infra* & accompanying text.

²⁷⁴ See notes 114-20 *supra* & accompanying text.

²⁷⁵ Gellhorn, *supra* note 18, at 376-83.

²⁷⁶ *Id.* 387. Cf. notes 524-32 *infra* & accompanying text.

²⁷⁷ Gellhorn, *supra* note 18, at 380.

²⁷⁸ See note 53 *supra* & accompanying text.

²⁷⁹ Reasons for limiting public participation in adjudicative proceedings are discussed below in the context of the FTC.

²⁸⁰ See note 19 *supra* & accompanying text.

²⁸¹ Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).

hibited a special interest"²⁸² in the contested issues and has the cohesive organization and resources to present its views effectively. If, however, this latter consideration is consistently decisive of the choice of an intervenor, there is the danger that the favored group will establish its hegemony as the spokesman for a point of view.²⁸³ Professor Gellhorn himself notes that his final criterion, the cost and delay attributable to intervention, "cannot be legitimately charged as a drawback of public interest group participation, [if] a prior judgment has been made that consideration of [the issues raised by an intervenor] is essential to successful performance of the agency's mandate."²⁸⁴

E. *Proposals to Facilitate Public Participation*

If intervention by public interest groups is to mean anything more than announcing a presence, presenting general legal arguments without supporting factual data or expertise, and on occasion dramatizing an agency's inadequate consideration of certain issues, the problem of funding must be surmounted. "Assuring the legal rights of public interest representatives to participate in regulatory proceedings is a vital first step. It is, however, only a first step. Without further affirmative action to assure that public representatives actually appear, the legal right to participate will largely be a symbolic—perhaps merely a cosmetic—advance."²⁸⁵ The cost of participation—attorneys' fees, fees for expert witnesses, expenses of marshalling and presenting factual data, and transcript costs and similar charges—may effectively inhibit participation by any but the regulated interests.²⁸⁶ The present controversy is whether public interest participation should be financed with public funds and, if so, what form such financing should take. Resistance to public financing of such participation is evidenced by the controversy over tax exemptions for public interest law firms²⁸⁷ and the opposition of groups such as the United States Chamber of Commerce to the proposed Consumer Protection Agency (CPA).²⁸⁸

Public financing of public interest participation might take many forms. It has been suggested that the agencies themselves should bear most of the transcript, multiple copy, and other incidental costs asso-

²⁸² *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

²⁸³ At the Administrative Conference hearing on Recommendation 28, *see* note 18 *supra*, Malcolm S. Mason noted the danger that intervention might be limited "to a single representative of a particular interest, and thus will appear to give credentials to that group as 'the' representative of . . . [that] citizen interest however characterized."

²⁸⁴ Gellhorn, *supra* note 18, at 383.

²⁸⁵ Lazarus & Onek, *supra* note 19, at 1096.

²⁸⁶ *See* notes 447-73 (FCC), 708-21 (FTC), 785-91 (FPC) *infra* & accompanying text.

²⁸⁷ *See* Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 GEO. L.J. 561 (1971); Halpern & Cunningham, *supra* note 13, at 1109.

²⁸⁸ *See* *Hearings*, *supra* note 18, at 173.

ciated with those formal proceedings in which the public may participate²⁸⁹ and that "in-house" expertise of federal agencies or neutral experts appointed by the agency deciding the issue should be made available to public participants.²⁹⁰ Certainly, the efforts of an active investigative staff could alleviate the burden on, and perhaps the need for, public representatives.²⁹¹

Numerous solutions have been offered to what is perhaps the most perplexing problem—financing attorney and expert witness fees. One approach would create new money-damage remedies, or class actions permitting the consolidation of small claims, to encourage private practitioners to take cases on a contingent fee basis.²⁹² Assessing the regulated interests for fee awards or the cost of public representation could also provide an incentive,²⁹³ but the dangers of imposing new liabilities of indeterminate extent on those interests, the inefficiency of the contingent fee system in areas of tort litigation, and the emphasis on litigation, as opposed to participation in agency proceedings, such an arrangement might encourage, are obvious shortcomings. A foundation for fee shifting in the absence of statutory authority may have been laid by the Supreme Court's decision in *Mills v. Electric Auto-Lite Co.*,²⁹⁴ which awarded attorney's fees as well as costs to the plaintiffs who successfully brought a stockholders' derivative action for the dissemination of misleading proxy statements.²⁹⁵ Though the action created no monetary fund, the Court found that the suit "conferred a substantial benefit on the members of an ascertainable class, and . . . an award . . . will operate to spread the costs proportionately among them."²⁹⁶ Reimbursement of fees for private law enforcement could conceivably be extended to other areas of social concern, such as enforcement of pollution and consumer protection laws.²⁹⁷ The vague contours of *Mills'* benefit rationale, the possibility of numerous, abusive nuisance suits for relatively minor violations of the law,²⁹⁸ and the problem of deciding which litigants or participants in an administrative proceeding have in fact conferred a benefit to a segment of the public, may inhibit widespread adoption of the fee-shifting principle. Indeed,

²⁸⁹ See, e.g., Gellhorn, *supra* note 18, at 389-93.

²⁹⁰ *Id.* 393-94.

²⁹¹ See notes 793-99 *infra* & accompanying text.

²⁹² See generally Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80 (1969).

²⁹³ Lazarus & Onck, *supra* note 19, at 1100-02; cf. notes 456-70 *infra* & accompanying text.

²⁹⁴ 396 U.S. 375 (1970).

²⁹⁵ *Id.* at 390-93. See also Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970).

²⁹⁶ 396 U.S. at 393-94.

²⁹⁷ See Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 329-30 (1971).

²⁹⁸ See *id.* 334.

the Administrative Conference has refused to endorse reimbursement of incurred legal expenses.²⁹⁹

The subsidy approach would permit the agency, in its discretion, to reimburse public interest participants for legal and witness fees,³⁰⁰ or, in the alternative, to establish within the agency a special office to provide legal assistance to public interest participants.³⁰¹ This approach assumes, of course, that agencies presently possess statutory authority to incur such expenses.³⁰² The obvious objections to this suggested approach are that the agency itself passes on the utility of intervention and, under the second alternative, has a great deal of control over how the case will be presented, a factor which would undoubtedly impair a participant's critical perspective.

A third approach would institutionalize public advocacy, and is exemplified by the proposed Public Counsel Corporation.³⁰³ The bill would have enabled the corporation to

(1) represent, either directly or by contract with appropriate individuals or private organizations, the interests of the unrepresented public and, where appropriate, separate interests of distinct groups within the unrepresented public, in proceedings before regulatory agencies . . . provided that in carrying out its contracting authority under this section, the corporation shall give preference to nonprofit organizations with experience in representing the public interest before Federal agencies;

(2) initiate rulemaking proceedings in any regulatory agency when otherwise authorized . . . ;

(3) collect and disseminate to all interested organizations and to the general public information concerning rule-making . . . ;

(4) represent, upon request, individuals or private organizations who seek judicial review of Federal administrative actions³⁰¹

²⁹⁹ Administrative Conference of the United States, Recommendation 28, adopted Dec. 7, 1971; see note 18 *supra*.

³⁰⁰ See Lazarus & Onek, *supra* note 19, at 1009-10; cf. note 713 *infra* & accompanying text.

³⁰¹ See note 452 *infra* & accompanying text.

³⁰² See Lazarus & Onek, *supra* note 19, at 1100.

³⁰³ The Public Counsel Corporation was first proposed in 1970 but was never reported out of committee. See *Hearings on S. 3434 & S. 2544 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). The proposal was recently reintroduced. See *Hearings on S. 1423 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971). For an earlier recognition of the possibilities of this approach to increasing administrative accountability, see Cahn & Cahn, *supra* note 13.

³⁰⁴ S. 3434, 91st Cong., 2d Sess. § 588(a) (1970) (referred to the Committee on the Judiciary, Feb. 10, 1970).

The bill would thus have authorized the establishment of an agency staff which could develop its own expertise, policy, and continuity, while providing, through independent contracts with public interest law firms appearing before agencies and reviewing courts, a measure of insulation from the pressures to conform to the norms of its own bureaucracy. Most important, the corporation would have been enabled to represent a wide variety of interests.³⁰⁵

In contrast, the Consumer Protection Act, one version of which was passed by the House in 1971³⁰⁶ and another of which is presently under consideration by the Senate,³⁰⁷ is much less ambitious. It is directed primarily toward the problems of the consumer and does not in terms embrace the wide spectrum of problems affecting the environment or the poor and minority groups. The bills authorize the employment of expert witnesses³⁰⁸ and the appointment of advisory committees,³⁰⁹ but do not authorize contracts with public interest law firms to provide independent representation. Though they do not purport to make the CPA the exclusive representative of consumers' interests, neither do they contemplate the direct financing of public interest law firms and kindred organizations, as did the Public Counsel Corporation proposal. The bills provide for the publication and distribution of information of general interest to consumers,³¹⁰ but the general provisions do not ensure any improvement in informing the public of the pendency of specific agency proceedings likely to affect their interests.³¹¹

At the heart of both bills are the provisions for representation before agencies and courts. In the House bill the agency has authority to participate in, but not to initiate, any rulemaking proceeding other than one "involving solely the internal operations of the Federal agency,"³¹² and may intervene in, but may not initiate, adjudicatory proceedings "other than an adjudication seeking primarily to impose a fine, penalty, or forfeiture."³¹³ This latter prohibition, if read broadly,

³⁰⁵ Lazarus & Onck, *supra* note 19, at 1097, suggest that any scheme should be judged in terms of the adequacy of financing, its independence from bureaucratic and industry controls, its accountability to the public, and its expertise.

³⁰⁶ 117 Cong. Rec. H9583 (daily ed. Oct. 14, 1971); see N.Y. Times, Oct. 15, 1971, at 1, col. 1.

³⁰⁷ S. 1177, 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 1177]. See *Hearings on S. 1177 & H.R. 10,835 Before the Subcomm. on Executive Reorganization & Gov't Research of the Senate Comm. on Gov't Operations*, 92d Cong., 1st Sess. (1971).

³⁰⁸ H.R. 10,835, 92d Cong., 1st Sess. § 202(b)(2) (1971) [hereinafter cited as H.R. 10,835]; S. 1177 § 206(a)(2).

³⁰⁹ H.R. 10,835 § 202(b)(3); S. 1177 § 206(a)(3).

³¹⁰ H.R. 10,835 § 206; S. 1177 § 205.

³¹¹ See notes 253-55 *supra* & accompanying text.

³¹² H.R. 10,835 § 204(a)(1).

³¹³ H.R. 10,835 § 204(a)(2). Section 204(c) provides that the CPA may request a federal agency to initiate such proceedings, but there is no obligation on the agency other than to notify the CPA of its reasons for declining to initiate such action; section 204(d) empowers the CPA to initiate or intervene in judicial review. *Id.* §§ 204(c), (d). The Senate bill, S. 1177 § 203(a), does not provide for review of failures of the agency to act.

might foreclose participation in a variety of proceedings affecting consumers' interests: for example, a proceeding resulting in a cease-and-desist order or in a civil penalty. The Senate bill has no analogous section though the limitation appears to be implied.³¹⁴ The Moorhead amendment³¹⁵ to the House bill would have permitted the CPA to participate in such proceedings in the role of consumer advocate, addressing broad issues of policy and the nature of an appropriate civil remedy, but not in the role of a second prosecutor litigating the guilt of a respondent or the nature of a criminal sanction.³¹⁶ The amendment would also have added the following section to the bill:

The Agency, as a matter of right, may undertake reviews and investigations, and require information from Federal agencies . . . for the purpose of submitting information, findings, or recommendations to the Congress regarding any matter affecting the interests of consumers concerning which a Federal agency has the authority but fails to initiate a rulemaking or adjudicatory proceeding³¹⁷

The CPA would thus have been permitted to duplicate the factfinding functions of rulemaking or adjudicatory proceedings affecting consumer interests which an agency had declined to initiate; the CPA would arguably have the subpoena power which the agency had refused to use in declining to initiate.³¹⁸ The ultimate effect would have been either to force the agency to initiate proceedings or to have the agency's informal procedures subjected to intense scrutiny.

During the course of the House debate, one commentator felt the amendment posed a "risk of grave interference with the functioning and responsibility of Federal agencies."³¹⁹ The bewildering variety of informal agency action makes it impossible to define with any particularity what the nature and scope of the CPA's power would have been under the amendment. That power might permit inquiry into virtually every exercise of agency discretion in its informal operations. The defeat of the amendment, however, does not necessarily imply that there should not be a more narrowly defined power on the part of the CPA

³¹⁴ See *Hearings*, *supra* note 307, at 156 (staff comparison of the House & Senate bills), 11 (statement of Representative Holifield).

³¹⁵ Amendment offered by Representative Moorhead, 117 CONG. REC. H9503 (daily ed. Oct. 13, 1971), rejected by the House, 117 CONG. REC. H9571-72 (daily ed. Oct. 14, 1971).

³¹⁶ 117 CONG. REC. H9503 (daily ed. Oct. 13, 1971). One commentator thought the original language conveyed the same intent. Letter from Roger C. Cramton, Chairman of the Administrative Conference of the United States, to Representative Holifield, in 117 CONG. REC. H9484-85 (daily ed. Oct. 13, 1971).

³¹⁷ 117 CONG. REC. H9503 (daily ed. Oct. 13, 1971).

³¹⁸ The Senate bill, S. 1177 § 205(d), provides for greater subpoena power. See *Hearings*, *supra* note 307, at 10 (statement of Representative Holifield).

³¹⁹ Cramton, *supra* note 316, at H9485. See Kilpatrick, *Coming Up Strong: Consumer Agency*, Evening Bulletin (Philadelphia), Mar. 25, 1972, at 10, col. 2; cf. CONSUMER REPORTS, Feb. 1971, at 80.

to investigate, and perhaps initiate review of, certain classes of informal agency action. That power might, for example, extend to FTC consent orders or approvals of mergers potentially affecting consumers, or to agency prosecutorial discretion in similar areas. The intervention section of the Senate bill provides for easier access to agency proceedings than the House bill.³²⁰ The bill passed by the House gives the CPA essentially no greater right to intervene in or initiate formal agency action than that of private parties.³²¹ As a practical matter, an agency might be less likely to limit the procedural privileges allowed the CPA as intervenor, although the agency might feel more justified in denying such privileges to a public interest group intervening independently in the same proceeding. The CPA, which is Congress' most adventurous attempt to date to facilitate the representation of unrepresented interests, makes no provision for the public financing needed by public interest groups to participate effectively, and in some instances may, paradoxically, tempt agencies to limit the scope of their participation.

Congressional reliance upon independent agencies like the CPA to achieve the objective of broadened public participation, without supplemental support for independent public interest groups, may mean that the latter will not advance beyond their present state of effectiveness. They are assured by *Welfare Rights* the opportunity to intervene to the extent necessary to make the expanded right of review under *Data Processing* effective, but are as yet in desperate need of financial support to enable them to use that opportunity to the fullest.

II. AN ANALYSIS OF FIVE AGENCIES' EXPERIENCE WITH PUBLIC PARTICIPATION

A. Federal Communications Commission

The primary responsibility of the Federal Communications Commission (FCC) is the regulation of communications common carriers³²² and broadcasting services.³²³ Demands for public participation are currently being pressed with most frequency and zeal in proceedings involving the renewal of broadcasting licenses. Several reasons may explain this focus: the initial licensing of the more profitable segments of the radio spectrum allocated to radio and television broadcasting has

³²⁰ Compare S. 1177 § 203 with H.R. 10,835 § 204. See *Hearings, supra* note 307, at 155 (staff comparison of the 2 bills), 160 (discussion by Representative Rosenthal of differences between the bills).

³²¹ While the House bill may be less intrusive in this respect, it does provide broad authority for the CPA to initiate judicial review, whether or not the CPA was a party to the proceedings below. H.R. 10,835 § 204(d). The Senate bill allows the CPA to initiate judicial review only if it intervened in the agency proceeding. S. 1177 § 203(d). See *Hearings, supra* note 307, at 224 (statement of Roger C. Cramton).

³²² 47 U.S.C. §§ 201-23 (1970).

³²³ *Id.* §§ 301-99.

been substantially completed,³²⁴ the licenses must be renewed at three-year intervals,³²⁵ and the rules covering contested renewals provide opportunity for the public to express its dissatisfaction with a licensee's previous performance³²⁶ and, in many cases, to obtain judicial review of adverse agency determination.³²⁷

A renewal hearing is a serious and costly affair for all concerned,³²⁸ but one to which only a minute percentage of broadcast licenses are now subjected.³²⁹ Even though a broadcast license is a privilege³³⁰ and a public trust subject to revocation,³³¹ creating no right "beyond the terms, conditions, and periods of the license,"³³² the broadcast industry regards the failure to renew with terror, calling it a "death sentence."³³³ The FCC itself has viewed the refusal to renew as the "supreme penalty, one which by custom has been reserved for transgressors whose acts of disobedience or folly have reached major dimensions."³³⁴ There are, of course, statutory rules³³⁵ and overtones of

³²⁴ At the close of fiscal year 1970, only 82 commercial AM, 134 commercial FM and 129 commercial television (UHF & VHF) frequencies still were available. See 36 FCC ANN. REP. 144-46 (1970). Since July 1968, however, the Commission has refused to accept applications for new AM radio stations. *Id.* 42. Of the available FM licenses, most are for low power class A stations which are commercially less desirable than the higher powered class B and C stations, which have greater coverage and can therefore demand higher advertising revenues. See *id.* 43-44. "In many parts of the country . . . only the class A channels in the smaller cities remain." *Id.* 44. Of the remaining television frequencies, the bulk are in the less profitable UHF band. See *id.* 41, 159.

³²⁵ 47 U.S.C. § 307(d) (1970); see 47 C.F.R. §§ 73.34, .218 (1971). In contrast, the FPC may, for example, grant licenses for terms of up to 50 years. See note 725 *infra* & accompanying text.

³²⁶ See notes 343-400 *infra* & accompanying text.

³²⁷ *Id.*

³²⁸ See note 466 *infra*.

³²⁹ In 1967, 6 applications for renewal were designated for hearing (0.24% of all applications renewed); in 1968, 15 (0.51%); in 1969, 17 (0.62%). Comment, *Public Participation in License Renewals and the Public Interest Standard of the FCC*, 1970 UTAH L. REV. 461, 463 n.21. In fiscal 1970, 18 renewal applications were designated for hearing (0.68% of all applications renewed). 36 FCC ANN. REP. 147-48 (1970). About 7700 licenses are renewed every three years. Compare *id.* 2 with Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 879 (1971).

³³⁰ Television licensees recover during their three-year terms an average of from 200% to about 600% of their investment. Fenton, *The Federal Communications Commission and the License Renewal Process*, 5 SUFFOLK U.L. REV. 389, 414 (1971).

³³¹ See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

³³² 47 U.S.C. § 301 (1970); see *Aslbacker Radio Corp. v. FCC*, 326 U.S. 327, 331-32 & n.6 (1945); accord, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). In fact, no license will be granted until the applicant has signed a waiver of claim to a frequency "because of the previous use of the same." 47 U.S.C. § 304 (1970).

³³³ See D. GILLMOR & J. BARRON, *MASS COMMUNICATION LAW* 711 (1969).

³³⁴ *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18, 26 (1970); cf. Comment, *The Fairness Doctrine and Broadcast License Renewals: Brandywine-Main Line Radio, Inc.*, 71 COLUM. L. REV. 452, 458 (1971).

³³⁵ See Administrative Procedure Act § 9(c), 5 U.S.C. § 558(c) (1970); 47 U.S.C. § 402(a) (1970) (applying the APA to certain FCC appeals); cf. *id.* §§ 312 (c)-(e) (requirements of serving of order to show cause, hearing, burden of proof on Commission, and application of APA in license revocation proceedings).

due process protections in the background³³⁶ suggesting that the refusal to grant another license to an incumbent broadcaster cuts much closer to the line of a deprivation of property than the denial of a privilege associated with the initial licensing proceeding.

The determination whether to renew normally focuses on the licensee's performance during the preceding license period.³³⁷ Although the showing required to warrant renewal is unsettled,³³⁸ members of the public within the area served by the licensee are in a particularly good position to contribute to any inquiry into that history.³³⁹ The public is faced with the relatively narrow questions of programming desires and preferences and their allocation within the limits of an established number of available frequencies.³⁴⁰ Broader questions concerning, for example, the structure of the broadcasting industry, the impact of the size, technological operation, and placement of facilities on the social, economic, and ecological systems, and the economical use of the total radio band, have either been resolved by arrangement with

³³⁶ See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965). See also 1 K. DAVIS, *supra* note 23, §7.18, at 495-97.

³³⁷ See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966); cf. W. EMERY, *BROADCASTING AND GOVERNMENT: RESPONSIBILITIES AND REGULATIONS* 246 (1971).

³³⁸ The controversy over this issue and the consequent congressional reexamination of both the Commission's renewal process and substantive criteria for renewal have been precipitated chiefly by the Commission's first decision not to renew the license of a broadcaster whose performance was judged only "average" and to award the frequency to a challenger. *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir.), *cert. denied*, 402 U.S. 923 (1971). For reaction to *WHDH*, see S. 2004, 91st Cong., 1st Sess. (1969); Goldin, "Spare the Golden Goose"—*The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970); Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969); Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368 (1970); 20 CATH. U.L. REV. 328 (1970).

The Commission's Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970), which conferred upon an incumbent licensee a controlling preference over another applicant by showing past performance substantially serving the public, was successfully attacked by the Citizens Communications Center and Black Efforts for Soul in Television (BEST). *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). The Policy Statement had "served to deter the filing of a single competing application for a television renewal in over a year . . ." *Id.* at 1206; see Comment, *Implications of Citizens Communications Center v. FCC*, 71 COLUM. L. REV. 1500 (1971). The groups had earlier petitioned for rulemaking proceedings for comparative broadcast hearings. BEST, 21 F.C.C.2d 355 (1970). But see *Moline Television Corp.*, 31 F.C.C.2d 263 (1971), *appeal docketed sub nom. Community Telecasting Corp. v. FCC*, No. 71-1741, D.C. Cir., Sept. 17, 1971 (Commission gave preference in a comparative hearing to an incumbent whose performance was inferior to its past promises, and renewed its license). The decision, characterized by Commissioner Johnson as "lawless," *id.* at 277, was reported as "being read by legal specialists . . . as evidence that the F.C.C.'s Republican majority will tend to favor incumbent broadcasters against their rivals." N.Y. Times, Aug. 24, 1971, at 75, col. 4.

³³⁹ It has been observed, however, that "recognizing the standing of members of the broadcasting audience to challenge renewal applications will not further the judicial policy of encouraging meaningful public participation in the renewal process if the Commission at the same time refused to re-evaluate its broadcasting standards" or leaves the public unapprised of licensing criteria. Comment, *supra* note 329, at 465.

³⁴⁰ See 47 C.F.R. §§73.21-.29, .202, .203, .606, .607 (1971); cf. *id.* §2.106.

other governmental bodies,³⁴¹ been determined through rulemaking proceedings,³⁴² or not been perceived as problems by anyone with opportunity and sufficient concern to raise them.

1. Standing Before the FCC

Broadcast licenses may be granted or renewed only if the Commission finds that "the public interest, convenience, and necessity would be served."³⁴³ Anyone may file a petition to deny a license or license renewal, which "petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with" the public interest, convenience, and necessity.³⁴⁴ If the petition to deny presents a "substantial and material question of fact," or if the Commission is unable to find affirmatively that grant of the application would serve the public interest,³⁴⁵ the Commission "shall formally designate the application for hearing."³⁴⁶ Those who file petitions raising such questions and satisfy the "party in interest" requirement may participate as full parties to the hearing;³⁴⁷ other persons "may file a petition for leave to intervene," and, on a showing of the requisite interest and of the contribution the petitioner will make to the determination of the issues, may become parties to the proceeding.³⁴⁸ Furthermore, "[n]o person shall be precluded from giving any relevant, material, and competent testimony at a hearing because he lacks a sufficient interest to justify his intervention as a party in the matter."³⁴⁹

³⁴¹ For example, the control of government-owned-and-operated stations rests in the President, 47 U.S.C. § 305(a) (1970), who has delegated that function to the Office of Telecommunications Policy (OTP), *see* Exec. Order No. 11,556, 3 C.F.R. 548 (1971), 47 U.S.C. § 305 (1970); Reorganization Plan No. 1 of 1970, 6 WEEKLY COMP. PRES. DOC. 156 (1970), 47 U.S.C. § 305 (1970); *cf.* 3 U.S.C. § 301 (1970). The OTP coordinates its functions with the FCC and the Interdepartmental Radio Advisory Committee, which is "composed of representatives of those Federal agencies making extensive use of radio." 36 FCC ANN. REP. 112 (1970); *see* 1971/72 U.S. GOVERNMENT ORGANIZATION MANUAL 556-57 (1971); *cf.* 47 C.F.R. § 0.37 (1971).

In the area of deceptive advertising, the Communications and Trade Commissions have maintained an arrangement since 1957 "whereby the FTC will advise the FCC of questionable advertising broadcast over radio and television stations." Liaison Between FCC & FTC Relating to False & Misleading Radio & TV Advertising, 22 F.C.C. 1572 (1957). For subsequent FCC-FTC agreements, *see* [CURRENT SERVICE] P & F RADIO REG. §§ 11:401, :402 (1971); *cf.* W. EMERY, *supra* note 337, at 72-82.

³⁴² *See, e.g.,* note 340 *supra*.

³⁴³ 47 U.S.C. § 309(a) (1970).

³⁴⁴ *Id.* § 309(d) (1).

³⁴⁵ *Id.* §§ 309(d) (2), (e).

³⁴⁶ *Id.* § 309(e).

³⁴⁷ 47 C.F.R. § 1.223(a) (1971). *See* American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962) (interlocutory review and reversal of denial of intervention by a trade union whose status as a party in interest was conceded, but deemed by the Commission not useful).

³⁴⁸ 47 C.F.R. § 1.223(b) (1971).

³⁴⁹ *Id.* § 1.225(b). Less formal channels for public participation are also available. "[A]ny person" may submit "informal objections" to the grant, renewal, or assignment of a license, *id.* § 1.587, and, during a license term, informal requests for Com-

The evolution of the rule that one show that he has an interest, while not consistent, has been toward complete obliteration of the requirement. Before enactment of section 309(c), the precursor of the present petition-to-deny section, the Federal Communications Act contained no provision covering intervention.³⁵⁰ By the time the section was added, the Supreme Court had handed down a germinal case on standing to appeal from administrative decisions. *FCC v. Sanders Brothers Radio Station*³⁵¹ allowed standing to a competitor facing a direct economic injury by the grant of a license, even though that interest was not one the agency could have considered in refusing to grant a license.³⁵² The concept of such a "private attorney general"³⁵³ was founded on the rationale that a plaintiff willing to challenge the agency's effectuation of its statutory mandate, and having sufficient economic stake in the outcome to litigate seriously, served a useful function by supplementing the Commission's resources.³⁵⁴ As has been discussed earlier,³⁵⁵ this concept has been instrumental in greatly broadening the scope of judicial review over agency decisionmaking.

When enacted in 1952,³⁵⁶ section 309(c)'s "party in interest" phrase was intended to authorize intervention in FCC proceedings only to the extent allowed by the *Sanders* decision for appeals from agency decisions.³⁵⁷ As late as 1959 it was possible for one student commentator, by logically extending the *Sanders* rationale to include situations in which the intervenor could provide useful factual data for the Commission,³⁵⁸ to criticize expansion of the term to include "secondary" competitors as being unsupported by equity, redundant, because primary competitors might be found, and unjustifiably burdensome on Commission resources.³⁵⁹ Today, however, the interest requirement as

mission action may be submitted, *id.* §1.41. *See, e.g.,* Friends of the Earth, 24 F.C.C.2d 743 (1970), *rev'd*, 449 F.2d 1164 (D.C. Cir. 1971) (fairness doctrine complaint on automobile pollution); San Francisco Women for Peace, 24 F.C.C.2d 156 (1970), *aff'd sub nom.* Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971) (fairness-doctrine complaints on military recruitment); Boalt Hall Student Ass'n, 25 F.C.C.2d 70 (1969) (fairness-doctrine complaint on governor's speech). The fairness doctrine of the FCC ensures "reasonable opportunity for discussion of conflicting views on issues of public importance." Citizens Communication Center, Primer on Citizens' Access to the Federal Communications Commission 4 (1971 draft).

³⁵⁰ Communications Act of 1934, ch. 652, §309, 48 Stat. 1085. *See* 107 U. PA. L. REV. 551, 552 (1959). *See* note 405 *infra*.

³⁵¹ 309 U.S. 470 (1940).

³⁵² *Id.* at 476.

³⁵³ The precise phrase, however, was subsequently coined by Judge Frank in *Associated Indus., Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

³⁵⁴ 107 U. PA. L. REV. 551, 556 (1959); *see* 309 U.S. at 477.

³⁵⁵ *See* notes 53-54 *supra* & accompanying text.

³⁵⁶ Act of July 16, 1952, ch. 879, §7(e), 66 Stat. 715.

³⁵⁷ S. REP. No. 44, 82d Cong., 1st Sess. 8 (1951).

³⁵⁸ *Sanders* itself, however, spoke only to the proposition of presenting errors of law to appellate courts. *See* 309 U.S. at 477.

³⁵⁹ *See* 107 U. PA. L. REV. 551, 556-59 (1959).

interpreted by the courts³⁶⁰ is so weak that knowledgeable commentators have felt free to state simply that a complaining party who is responsible for initiating the hearing process with a petition to deny alleging material issues, "usually has a substantial stake in the proceeding and may be able to make a contribution,"³⁶¹ which distinguishes him from the public at large.³⁶²

In 1965, a petition to deny the renewal application of television station WLBT in Jackson, Mississippi, was filed by the Office of Communications of the United Church of Christ, a "national denomination, with churches and members in . . . the prime service area covered by WLBT,"³⁶³ the local congregation of the church, and two Mississippi civil rights leaders, asserting that "the station failed to present programming designed to serve the particular needs and interests of the Negro Community" and did not "give a fair presentation of the issues."³⁶⁴ The Commission denied standing to the petitioners, following its established doctrine that

members of the general public who do not show a direct causal relationship between the action being protested and some injury of a tangible and substantial nature have no standing purely as members of the general public.³⁶⁵

The FCC reasoned that minority groups had "no greater interest or claim of injury than the general public," otherwise "any minority group based on race, creed, color, or national origins could gain standing as a representative of the public interest."³⁶⁶ The United Church of Christ was therefore not a party in interest within the meaning of section 309(d)(1).³⁶⁷

On appeal, the Court of Appeals for the District of Columbia Circuit, in its landmark *United Church of Christ* decision,³⁶⁸ disagreed and reversed. The court could see no reason to exclude the listening public, those "most directly concerned with and intimately affected by the performance of a licensee,"³⁶⁹ from the renewal process. Indeed, public spokesmen might be the only source from which the Commission could learn of programming deficiencies or other objectionable prac-

³⁶⁰ See text accompanying notes 377-95 *infra*.

³⁶¹ Shapiro, *supra* note 37, at 728.

³⁶² Cf. Gellhorn, *supra* note 18, at 380.

³⁶³ Lamar Life Broadcasting Co., 38 F.C.C. 1143, 1143 n.1 (1965).

³⁶⁴ *Id.* at 1148.

³⁶⁵ *Id.* at 1149 n.11.

³⁶⁶ *Id.* (emphasis in the original).

³⁶⁷ See note 344 *supra* & accompanying text. The Commission did, however, consider the allegations of the Church as set forth in the petition to deny "irrespective of any question of standing or related matters." 38 F.C.C. at 1149.

³⁶⁸ *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

³⁶⁹ *Id.* at 1002.

tices.³⁷⁰ The court chastised the Commission for rigidly allowing standing to intervene only to those alleging electrical interference or direct economic injury³⁷¹ and for discounting the efficacy of consumer participation.³⁷²

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.³⁷³

The court held that "some 'audience participation' must be allowed in license renewal proceedings,"³⁷⁴ and remanded the case to the Commission for a hearing, directing that "one or more" of the appellants be granted standing "as responsible representatives."³⁷⁵ The court suggested that the Commission develop standards to determine which community representatives should participate and how that participation could best be effectuated.³⁷⁶

While the development of standing to intervene in FCC proceedings was left by Congress to the agency and, by virtue of the rules of standing to appeal, the courts,³⁷⁷ further judicial pronouncements on

³⁷⁰ *Id.* at 1004-05.

³⁷¹ *Id.* at 1000-02. See 107 U. PA. L. REV. 551, 555-56 (1959).

³⁷² 359 F.2d at 1004.

³⁷³ *Id.* at 1003-04.

³⁷⁴ *Id.* at 1005.

³⁷⁵ *Id.* at 1006. On remand, standing was granted to all 4 petitioners. The Commission expressed a preference for organizations rather than individuals, granting the individual petitioners standing only because they were represented by the same counsel as the Church. *Lanier Life Broadcasting Co.*, 3 F.C.C.2d 784, 786 (1966).

³⁷⁶ 359 F.2d at 1005-06. For further discussion of the principal case, as well as commentary on the development of FCC standing prior to 1966, see Keller, *The Law of Administrative Standing and the Public Right of Intervention*, 21 FED. COM. B.J. 134 (1967); Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 65 COLUM. L. REV. 1511 (1966); Note, 13 WAYNE L. REV. 377 (1967).

³⁷⁷ 359 F.2d at 1001-02; Comment, *supra* note 376, at 1519 & n.52. (The note discusses the legislative history of the Federal Communications Act and notes that it is silent as to the meaning of the phrase "parties in interest." The commentator concludes, however, on the basis of this silence alone, that the development of standing was left to the federal courts.) Courts will not, of course, hear the appeal of one who failed to exhaust administrative remedies as, for example, by failing to seek party status before the agency or by failing to seek a rehearing, regardless of standing claims or requests for meritorious substantive relief. See *Joseph v. FCC*, 404 F.2d 207, 209 (D.C. Cir. 1968); 47 U.S.C. § 405 (1970).

the subject have been rare, but have effectively removed viable requirements for standing from the agency's arsenal for the control of hearings. In *Joseph v. FCC*,³⁷⁸ the court upheld an individual listener's standing to challenge the assignment of a Chicago fine arts station³⁷⁹ "as a representative of the listening public."³⁸⁰ *Hale v. FCC*,³⁸¹ while not squarely facing the standing issue, lends further support to the granting of intervention to individuals. The Commission avoided the question of the standing of two individuals who were protesting the proposed license renewal of station KSL, Salt Lake City, Utah. The petitioners charged that the station was part of an undue concentration of communications media and was furthering only its own economic and ideological interests in its programming.³⁸² The FCC suggested that, under *United Church of Christ*, "petitioners must have a legitimate interest in the proceedings, by showing that they are responsible representatives of groups representative of the listening public, rather than speaking for only individuals."³⁸³ While the agency found that "substantial procedural issues" were raised, it decided not to pursue them as the case could be disposed of on the merits without a hearing.³⁸⁴ Commissioner Johnson's dissent strongly rejected the majority's intimation that only formal organizations could be responsible representatives of the public:

Surely there are few people who do not recognize the ease by which paper groups can be organized around a few activists. But does this Commission really intend to sacrifice the public interest on the altar of such hollow legalism?³⁸⁵

³⁷⁸ 404 F.2d 207 (D.C. Cir. 1968).

³⁷⁹ "No . . . station license . . . shall be . . . assigned . . . except . . . upon [a] finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(b) (1970). The Citizen's Committee to Save WFMT (FM) also challenged the assignment, but since the Committee had not taken any action before the FCC, the court held that it had not exhausted administrative remedies and therefore the court could only consider the individual challenger's contentions. 404 F.2d at 209 & n.4.

³⁸⁰ 404 F.2d at 210. The court cited *United Church of Christ* for the proposition that "[t]he allegations in the motion . . . demonstrated at least prima facie standing." *Id.* at 211. Referring to the argument that the petitioner failed to move for reconsideration as a prerequisite for judicial review, the court reasoned that petitioner's motion for intervention, which was evidently considered after the initial decision, served the purpose of the condition for review, especially as a "representative of the listening public" usually "[does] not have the same sort of Washington representation to uncover threats to their interest, or deploy apparatus to combat them, as do parties whose interest is economic." *Id.* at 210. The decision has been criticized as "[over-looking] administrative requirements in order to reach the merits in an appealing case," 57 GEO. L.J. 631, 639 (1969), but should properly be praised, as refusing to insulate the Commission from judicial review because of relatively minor procedural barriers.

³⁸¹ 425 F.2d 556 (D.C. Cir. 1970).

³⁸² KSL, Inc., 16 F.C.C.2d 340, 344 (1969); see RESPONSES, *supra* note 30, at 61.

³⁸³ 16 F.C.C.2d at 344.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 349.

On appeal,³⁸⁶ the court apparently agreed with Commissioner Johnson, noting that

[KSL], but not the Commission, urges upon this appeal that appellants are without standing to complain, either before the Commission or in this court, of the license renewal. We think the Commission's position here reflects the more prescient reading of our opinion in [*United Church of Christ*].³⁸⁷

The court found, however, that the petitioner's generalized complaint about unfair programming and concentration of media control was more appropriate for rulemaking and that the Commission was undertaking a review of its policies concerning those issues.³⁸⁸

There may remain a rudimentary requirement of interest, but any hypothetical function it might serve in ensuring that a party litigate either well or energetically is doubtful. In *Martin-Trigona v. FCC*,³⁸⁹ the court denied a petition to review the Commission's denial of standing to an Urbana, Illinois, resident who had challenged the renewal of the licenses of the three major television networks' New York "flagship" stations. The FCC had determined that petitioner's complaints about excessive commercialization should have been directed at the local stations in his area rather than at the New York network stations.³⁹⁰ The court, questioning "[w]hether the matter is best approached analytically in traditional standing terms," dismissed on the merits without attempting to formulate standards for intervention before the FCC.³⁹¹ Citing *Hale*, the court said that petitioner's concerns raised broad policy issues more pertinent to the broadcasting industry as a whole than to the renewal of the individual licenses and were therefore more appropriately explored in rulemaking.³⁹² *Martin-Trigona* also challenged the renewal of station WRC-TV in Washing-

³⁸⁶ Appeals from decisions and orders of the FCC may be taken to the Court of Appeals for the District of Columbia Circuit "by any . . . person who is aggrieved or whose interests are adversely affected . . ." 47 U.S.C. § 402(b)(6) (1970). Intervention in an appealed case is limited to "any interested person," defined as "[a]ny person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the [FCC] order . . ." *Id.* § 402(e). That the same standard is applied to determine a "party in interest" for standing purposes before both Commission and court is supported by the courts and legislative history. Comment, *supra* note 377, at 1514 n.18. The reason is to allow persons who have a right to challenge FCC orders in court to first present their claims before the Commission. *Id.*; cf. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966).

³⁸⁷ *Hale v. FCC*, 425 F.2d 556, 558 n.2 (D.C. Cir. 1970).

³⁸⁸ *Id.* at 560.

³⁸⁹ 432 F.2d 682 (D.C. Cir. 1970).

³⁹⁰ *National Broadcasting Co.*, 20 F.C.C.2d 58, 59 (1969).

³⁹¹ *Martin-Trigona v. FCC*, 432 F.2d 682, 683 (D.C. Cir. 1970).

³⁹² *Id.*

ton, D.C.,³⁹³ and petitioned for the revocation of the licenses of all Metromedia television stations.³⁹⁴ Twice again he was denied standing. In the latter case, the Commission spoke of "viewer status" conferred by *United Church of Christ* but found "no decision extending 'viewer' standing to a non-resident transient who may occasionally watch a television station in a community he visits."³⁹⁵ The negative pregnant implicit in this statement is that responsible resident non-transient individuals may have standing to intervene.

Sheer aggregation of individuals without more, it should be noted, may not guarantee standing. A short time after *Martin-Trigona*, the Commission, while examining the questions raised in a petition to deny the assignment of the licenses of WCTW-AM and WCTW-FM, New Castle, Indiana, denied the standing of "a former corporate applicant, composed of over 100 citizens of New Castle, Indiana, representing a cross-section of community leaders,"³⁹⁶ saying in a footnote:

The fact that Petitioner is a former applicant does not entitle it to standing and the mere fact that over 100 citizens may be involved does not entitle it to standing.³⁹⁷

Petitioner, which filed in its corporate capacity, did not oppose the assignment because it objected to programming changes; its goal was the acquisition of a frequency for its own economic gain.³⁹⁸ The line is a close one, however, but neither Commissioner Johnson's "paper groups" nor the individuals representing them appear to be having difficulty obtaining standing by alleging that they represent a "substantial portion of the listening audience."³⁹⁹

It seems doubtful that any person or organization wishing to contest a license renewal could fail to find someone within the licensee's broadcast area willing to be represented so long as he is not required to bear the cost of the participation. *Martin-Trigona*, one is inclined to suspect, could have so presented himself to the Commission, and thus defeated the application of the standing requirement.⁴⁰⁰ Even if not

³⁹³ National Broadcasting Co., 20 F.C.C.2d 167 (1969).

³⁹⁴ Petition of Anthony Martin-Trigona, 18 P & F RADIO REG. 2d 581 (1970). The Commission is authorized to revoke any station license "because of conditions . . . which would warrant it in refusing to grant a license . . . on an original application . . ." 47 U.S.C. § 312(a) (2) (1970).

³⁹⁵ Petition of Anthony Martin-Trigona, 18 P & F RADIO REG. 2d 581, 582 n.1 (1970).

³⁹⁶ WCTW, Inc., 26 F.C.C.2d 268, 269 (1970).

³⁹⁷ *Id.* at 269 n.2.

³⁹⁸ *See id.* at 269.

³⁹⁹ Radio Station WSNT, Inc., 27 F.C.C.2d 993 (1971) (standing granted to 2 petitioners as individuals and as agents of organizations that "represent the interest of a substantial portion of the listening audience of WSNT" and that have "significant roots in the community," upon a showing of individual residency in the community); *see* Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18 (1970).

⁴⁰⁰ Alternatively, it may have been possible to allege that the major networks, which control a disproportionate share of the television market, *see* Variety, Sept. 15, 1971, at 29, cols. 1-5, so affected local programming as to provide a basis for standing.

dead, standing to intervene based on a requirement of an "interest" is both easily defeated as a barrier and useless as a means for assuring either a responsible or an energetic litigator. "Responsibility" is a loaded term, as Judge Burger must have realized in *United Church of Christ*, and energy or effort is supplied by the litigator, not the non-paying "party-in-interest."

2. The Discretionary Hearing

Had Martin-Trigona met the Commission's standing requirements, the court nevertheless would have supported the denial of the hearing he requested, and on grounds which have replaced the use of standing as a control of the major cost factor—whether to hold, rather than how extensive to make, a hearing. Limiting the total number of renewal hearings is both one of the Commission's most powerful tools for allocating its scarce resources efficiently and one of the tightest constraints on wider and more piercing examination of licensee practices. Fewer than one percent of renewal applications now go to hearing,⁴⁰¹ and a hearing is a condition precedent under statute to the denial of renewal.⁴⁰² As has been shown, the FCC has where possible rested denials on the lack of an "interest," a term the courts have now emasculated with the effect of opening completely the class of parties and thus the kinds of issues likely to be raised.⁴⁰³ The courts have been quicker than the Commission to perceive that control of the number of hearings must now be accomplished under the other allegation required of a petition to deny—a substantial and material question of fact raising a *prima facie* case that immediate grant of an application for renewal would not serve the public interest, convenience, and necessity.⁴⁰⁴ This limitation on a petitioner's ability to initiate a hearing was deliberately added to the Federal Communications Act by Congress to give the Commission the "authority to curb the abuses of the protest procedure through the power, in appropriate cases, to dispose of protests without holding a full evidentiary hearing."⁴⁰⁵ The requirements of substantiality and

⁴⁰¹ See note 329 *supra*.

⁴⁰² 47 U.S.C. § 309(e) (1970).

⁴⁰³ Petitioners still must allege facts with sufficient specificity to substantiate that they are parties in interest. 47 U.S.C. § 309(d)(1) (1970). This requirement leaves some discretion in the Commission to verify that status. See *NBC v. FCC*, 362 F.2d 946 (D.C. Cir. 1966); *Vermont New York Television, Inc.*, 6 F.C.C.2d 830 (1967).

⁴⁰⁴ 47 U.S.C. §§ 309(d)(2), (e) (1970).

⁴⁰⁵ S. REP. NO. 1231, 84th Cong., 1st Sess. 3 (1955). The protest procedure, operative when the Commission granted an application without a hearing, was first enacted in 1952. Act of July 16, 1952, ch. 879, § 7, 66 Stat. 715. In 1956 the protest procedure was amended to eliminate hearings where only inconsequential facts were alleged, but the Commission was required to find affirmatively that the public interest demanded a grant of a license. Act of Jan. 20, 1956, ch. 1, 70 Stat. 3. In 1960 the pre-grant procedure was changed to its present form. Act of Sept. 13, 1960, Pub. L. No. 86-752, § 4, 74 Stat. 889. The legislative history provides nothing but a tautologi-

materiality obviously refer to the seriousness and relevancy of disputed factual allegations that should be resolved by full inquiry, but the content of those terms is as variegated as the number of possible factual situations. Alleged violations of Commission rules or standards would seem to establish materiality, but whether or not a hearing is compelled usually depends upon the quality of the accompanying facts.⁴⁰⁶ Whether alleged facts sufficiently meet the legal standards so as to make a hearing necessary would appear to be a mixed question of fact and law. As such, the standards of judicial review have been inconsistently applied.⁴⁰⁷ Courts reviewing summary dispositions have ordered hearings where the licensee's alleged past performance would preclude renewal as a matter of law,⁴⁰⁸ where the Commission failed to substantiate its action with affirmative findings that the public interest, convenience, and necessity would be served,⁴⁰⁹ where the courts have ruled that the Commis-

cal explication of the standards implied by the language "substantial and material questions of fact" or "consistent with" the public interest, convenience, and necessity. See H.R. REP. No. 1800, 86th Cong., 2d Sess. (1960); S. REP. No. 690, 86th Cong., 1st Sess. (1959).

⁴⁰⁶ Compare *Louisiana Television Broadcasting Corp. v. FCC*, 347 F.2d 808 (D.C. Cir. 1965), with *Andy Valley Broadcasting System, Inc.*, 12 F.C.C.2d 3 (1968), and *WGN of Colorado, Inc.*, 31 F.C.C.2d 413 (1971). Compare *Retail Store Employees Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970), with *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969). Compare *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), with *Taft Broadcasting Co.*, 8 F.C.C.2d 19 (1967). There is a possibility that the Commission will soon be forced to articulate more precisely the standards incorporated in the term. See Brief for Appellee, *Stone v. FCC*, appeal docketed, No. 71-1166, D.C. Cir., Mar. 8, 1971 (argued Feb. 25, 1972), appeal from *Evening Star Broadcasting Co.*, 27 F.C.C.2d 316 (1971).

Compliance with Commission regulations would appear to immunize a renewal applicant from the threat of a hearing. See *Midwest Television, Inc.*, 17 F.C.C.2d 739 (1969). Allegations in a petition to deny of matters outside the jurisdictional ambit of the Commission's authority cannot be grounds to compel a hearing. See *Black Identity Educ. Ass'n*, 21 P & F RADIO REG. 2d 746 (1971).

⁴⁰⁷ 4 K. DAVIS, *supra* note 23, §30.07. Professor Davis has advocated that courts use a practical approach to determine whether agency decisions of mixed law or statutory interpretation and fact should be reviewed with a "rational basis" test or a stricter "substitution of judicial judgment" standard. *Id.* §§30.03-.06. Davis views the discretion to choose between the two tests as being influenced by a number of unarticulated considerations, including the court's attitude toward the agency, the degree of thoroughness and impartiality of the agency's performance, the importance of the subject matter, and the comparative qualifications of the court and the agency to decide the issue. *Id.* §30.14. Professor Jaffe, on the other hand, would limit the judicial power to review incidental agency lawmaking where there is a statutory purpose to confer upon the agency a policymaking function. L. JAFFE, *supra* note 33, at 573. Professor Jaffe, examining judicial review of FCC procedural decisions, has criticized the extent to which courts have substituted their judgment for the Commission's in instances where license applications have been granted, despite protests, without a hearing. "Whether the allegations present a matter upon which the Commission should expend its resources is par excellence a matter for the Commission, subject to review only for error of law or a grossly mistaken judgment." Jaffe, *Judicial Review of Procedural Decisions and the Philco Cases: Plus Ça Change!*, 50 GEO. L.J. 661, 680 (1962).

⁴⁰⁸ *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966).

⁴⁰⁹ See *Joseph v. FCC*, 404 F.2d 207 (D.C. Cir. 1968); cf. *Hudson Valley Broadcasting Corp. v. FCC*, 320 F.2d 723 (D.C. Cir. 1963).

sion misconceived its mandate,⁴¹⁰ and where issues felt by the courts to be consequential and controverted were not comprehensively considered.⁴¹¹

One further obstacle, deadlines for filing petitions to deny, limits the opportunity of those opposing the renewal of a license, whether competitors or those without an economic interest, to obtain a hearing. Current regulations prohibit the filing of petitions to deny renewal requests after the first day of the last full month of the expiring license term,⁴¹² giving the petitioner up to several months to respond to the licensee's renewal application.⁴¹³

[T]he Commission does not condone the practice of community groups waiting until long after an application for renewal . . . has been filed before raising any complaints they may have concerning a station's policies or program practices. . . . [This practice] is disruptive of the Commission's processes.⁴¹⁴

Following this policy, the FCC, in a decision criticized by dissenting Commissioner Johnson as appearing to be the work of an "anti-citizen, anti-audience body,"⁴¹⁵ denied a time extension for filing a petition to deny sought by the St. Louis Chapter of the Congress of Racial Equality. On March 5, 1971, the Commission announced, upon granting the Colorado Committee on the Mass Media and the Spanish Surnamed, Inc., a one week extension, that "[i]n the future . . . we shall simply deny these 'last-minute' requests, made without supporting basis." ⁴¹⁶

⁴¹⁰ See *Citizens Comm. v. FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970).

⁴¹¹ See *Retail Store Employees Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

⁴¹² 47 C.F.R. §§ 1.580(i), 1.516(e)(1) (1971).

⁴¹³ See *id.* § 1.539(a).

⁴¹⁴ *WSM, Inc.*, 24 F.C.C.2d 561, 563-64 (1970) (request for 30-day filing extension by a coalition of Nashville black community groups granted because coalition had been negotiating with the licensees; similar request by Memphis groups denied because they had not been negotiating with, and offered no reason for their delay in contacting, the licensees); *cf.* *Renewal of Licenses of Chicago Stations*, 20 P & F RADIO REG. 2d 594 (1970).

⁴¹⁵ *Congress of Racial Equality, St. Louis Chapter*, 27 F.C.C.2d 353, 354 (1971). Commissioner Johnson found "no sound reason why this complaint [alleging violations of the fairness doctrine and requesting a time extension to file a petition to deny] cannot properly be prosecuted in the pending . . . renewal proceeding," citing *United Church of Christ* for the proposition that the FCC should "welcome the voices of opposition." *Id.* The FCC did, however, assure CORE that it would accord full consideration to all additional information that CORE would file to supplement its fairness complaint. *Id.*

⁴¹⁶ *Colorado Broadcast Stations*, 28 F.C.C.2d 375, 377 (1971). Stating that "[s]ound regulation . . . has procedural as well as substantive elements, and the public interest comprehends both," the Commission subsequently dismissed the group's petition to deny filed four days after the extension. *WGN of Colorado, Inc.*, 31 F.C.C.2d 413, 413 (1971); *cf.* *Time-Life Broadcast, Inc.*, 29 F.C.C.2d 991 (1971). See also *Triangle Publications, Inc.*, 27 F.C.C.2d 1019 (1971). The Commission may grant extensions for petitions to intervene for good cause shown. 47 C.F.R. § 1.223(d)

The FCC is currently considering revising its policies on broadcast license renewals in an attempt to balance public participation and fairness to the renewal applicant.⁴¹⁷ The proposed rules, reflecting the impact of public interest groups, were prompted by the "significant increase in the number of petitions to deny or complaints directed to license renewal applications."⁴¹⁸ The purpose of the new rules is to encourage a continuing dialogue between the public and the licensee throughout the license period to "ensure [that] licensees remain conversant with and attentive to community problems throughout the license period and to promote resolution of complaints as they arise at the local level through discussion between complainant and the licensee (rather than through Commission inquiry)"⁴¹⁹ The licensee would be required to broadcast, at least once every eight days during prime time, a short notice informing the public of the appropriate manner in which to "express their satisfaction or complaints with station operation"⁴²⁰ and, for a period preceding the time for renewal of its license, a notice calculated to solicit participation in the renewal process.⁴²¹

Deadlines for filing renewal applications would be shifted from ninety days to four months before license expiration, and the period for filing petitions to deny would in effect be extended by one month.⁴²² No extension of time to file petitions would be granted without the consent of all parties, including the renewal applicant.⁴²³ This consent requirement is consonant with a policy of encouraging negotiations between the licensee and those opposing renewal with a view to settling differences and obtaining promises from the licensee to alter criticized practices without requiring resort to the Commission. If a licensee were engaged in good faith negotiation, it might be expected to consent to a time extension; if instead the licensee is not negotiating or is stalling with the intent of running the complainant past the filing deadline, the complainant would have ample time in which to file.⁴²⁴

(1971). See Council on Radio & Television, 23 P & F RADIO REG. 2d 185 (1971) (extension granted where licensee frustrated petitioner's attempts to examine copy of renewal application).

⁴¹⁷ See Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 27 F.C.C.2d 697 (1971). See also Geller, *Professor Elnan's Suggestions and the Federal Communication Commission: A Comment*, 59 Geo. L.J. 865, 866 (1971).

⁴¹⁸ 27 F.C.C.2d at 697.

⁴¹⁹ *Id.* at 700.

⁴²⁰ *Id.* at 708. During the period from 6 months prior to expiration of a license to 30 days prior to expiration, a renewal notice must be announced. *Id.* at 709.

⁴²¹ *Id.* at 709-11.

⁴²² *Id.* at 704. The extended filing period was in part a recognition that many community groups do not have legal counsel to prepare efficiently and file effective petitions. *Id.* at 706.

⁴²³ *Id.* at 706-07.

⁴²⁴ *Id.* at 707 n.4.

3. The Procedural Rights and Bargaining Power of the Intervening Listener

It thus appears that responsible public interest groups or individuals residing within the service area of a station whose license renewal is contested will be allowed to participate as parties in a renewal hearing if a petition to deny alleging adequate questions is seasonably filed.⁴²⁵ But an expanded definition of "interest" only increases the number of parties who may appear in a hearing. Although, by increasing the potential for large hearings, the expanded interest definition injects pressure to reduce the scope of participation of some or all participants, it neither requires such a result nor suggests how that result could be accomplished. At one point it appeared that the party status of a public interest complainant was to be inferior to that of the renewal applicant. On remand of the *United Church of Christ* case, for example, the FCC indicated that it was by statute⁴²⁶ and precedent⁴²⁷ permitted to place the burden of proof on the public interest group as to the issues of presentation of opposing views on important public questions and accessibility to the airways.⁴²⁸ The FCC felt that the intervenors were in at least as good a position as the applicant to know the facts relating to the charges of discriminatory broadcasting, and perhaps in a better position, since the applicant kept records of what it had presented, but not what it had not presented, for broadcast.⁴²⁹ The intervenors failed to meet this unrealistic burden, and all issues were resolved in the licensee's favor.⁴³⁰

In what has been described as "one of the most scathing opinions ever delivered against a federal agency,"⁴³¹ the same three-judge panel that decided the first *United Church of Christ* appeal again reversed the FCC.⁴³² While the decision has been thought to be procedurally "puzzling,"⁴³³ the opinion is an impassioned plea to a deaf Commission to listen:

⁴²⁵ Telephone interview with Henry Geller, Special Assistant to the Chairman, FCC, Aug. 26, 1971.

⁴²⁶ 47 U.S.C. § 309(e) (1970) ("[T]he burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny . . . such burdens shall be as determined by the Commission.").

⁴²⁷ *D & E Broadcasting Co.*, 1 F.C.C.2d 78 (1965). The burden of proof is generally upon the party charging serious misconduct, but if no petition to deny is filed, the burden shifts to the applicant with regard to such other issues as may be delineated by the FCC. *Id.* at 80.

⁴²⁸ *Lamar Life Broadcasting Co.*, 3 F.C.C.2d 784, 786-87 (1966).

⁴²⁹ *Lamar Life Ins. Co.*, 5 F.C.C.2d 37, 39 (1966).

⁴³⁰ *Lamar Life Broadcasting Co.*, 14 F.C.C.2d 431, 433, 437-38 (1968).

⁴³¹ Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368, 377 (1970).

⁴³² *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

⁴³³ 83 HARV. L. REV. 1412, 1413 (1970).

The Commission and the Examiners have an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest. The Public Intervenor, who were performing a public service under a mandate of this court, were entitled to a more hospitable reception in the performance of that function. As we view the record the Examiner tended to impede the exploration of the very issues which we would reasonably expect the Commission itself would have initiated; an ally was regarded as an opponent.

.
 . . . The Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Intervenor and their efforts.⁴³⁴

Finding "[t]he administrative conduct reflected in [the] record . . . beyond repair,"⁴³⁵ the court ordered yet a new hearing, directing the FCC to invite new applications for the license, and pronounced that a public intervenor should be regarded not as a plaintiff, but "more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an . . . investigation . . . and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred."⁴³⁶

As late as 1968, Commissioners Cox and Johnson were able to comment that "[g]rass-roots organizations from the communities themselves rarely participate; what efforts have been attempted in this vein have not been welcomed by the Commission or its staff."⁴³⁷ Participation has increased since that time, and has expanded as well into the area of informal settlements.⁴³⁸ The cost and time entailed by a hearing

⁴³⁴ 425 F.2d at 548-50 (footnotes omitted). The court apparently agreed with the dissent of Commissioners Cox and Johnson:

The Commission today shows its strong distaste for the presence of a complainant The record reveals that the United Church of Christ and its allies apparently have been regarded within the Commission as a kind of unfamiliar pestilence, to be scourged through harassment, the piling up of procedural obstructions, and the denial of rights clearly granted them by a reviewing court in this very same case.

Lamar Life Broadcasting Co., 14 F.C.C.2d at 464.

⁴³⁵ 425 F.2d at 550.

⁴³⁶ *Id.* at 546.

⁴³⁷ Renewal of Standard Broadcast & Television Licenses for Oklahoma, Kansas & Nebraska, 14 F.C.C.2d 2, 9 (1968).

⁴³⁸ Interviews with Henry Geller, Special Assistant to the Chairman, FCC, in Philadelphia, Aug. 26, 1971, Feb. 3, 1972. Although "[i]t is impossible, or at least unlikely, that there would ever be a sufficient number of public organizations to contest each of the . . . licenses in this country," Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 431 (1970) (Comm'r Johnson, dissenting), use of the settlement procedure may allow further increases. See text accompanying notes 441-42 *infra*.

have made informal settlement of differences between the licensee and protesting community groups an attractive alternative.

The Commission possesses statutory authority to approve a settlement agreement whereby a competing applicant in a comparative hearing situation withdraws his application.⁴³⁹ In the recent case of *KCMC, Inc.*,⁴⁴⁰ the Commission extended its power to include approval of an agreement effecting the withdrawal of a petition to deny renewal of a license. The petition, prepared by twelve local associations with the assistance of the Office of Communication of the United Church of Christ, alleged that television station KTAL, Texarkana, Texas, failed to serve the substantial black minority in its service area. The Commission assented to the withdrawal of the objections and granted renewal after a settlement between the station and the complainants, commenting that "[s]uch cooperation at the community level should prove to be more effective in improving local service than would be the imposition of strict guidelines by the Commission."⁴⁴¹ Commissioner Johnson, concurring in the approval of the settlement agreement "as an experimental gesture,"⁴⁴² expressed concern that the agreement would herald future abdication by the Commission of its statutory duties:

A license renewal proceeding is . . . a matter between the broadcaster-licensee and all the people in the community, a matter to be resolved by the FCC according to the statutory standard of the "public interest." The Commission can utilize the services of volunteer local groups. Indeed, it is so woefully understaffed that any thorough review of broadcaster performance simply must depend upon an aroused and involved citizenry.

But just as licenses should not wrongfully be withheld, revoked or denied in response to unwarranted citizen protest, so they should not be granted automatically because a certain group of once-protesting citizens has for some reason withdrawn its objections.⁴⁴³

Settlement agreements may expeditiously correct operating deficiencies alleged in a petition to deny, but, because they provide no assurance that other important issues will be considered by the Commission, there inheres the risk that those issues may not be "simply resolved by finding that certain complaints have been settled."⁴⁴⁴ In *KCMC* Commissioners Johnson and Lee were disturbed by the media concentration in

⁴³⁹ 47 U.S.C. § 311(c) (1970).

⁴⁴⁰ 19 F.C.C.2d 109 (1969).

⁴⁴¹ *Id.* at 109.

⁴⁴² *Id.* at 112 (separate statement of Comm'r Johnson).

⁴⁴³ *Id.* at 110.

⁴⁴⁴ *Id.* at 114 (Comm'r Lee, concurring).

KTAL's service area, an issue which "does not disappear merely by withdrawing a complaint."⁴⁴⁵

Insofar as the desires of a single group or individual do not necessarily express, and indeed might be adverse to, the ideal of the public interest, other difficulties appear. One petitioning group might settle on terms either more or less exacting than, or different from, those another group or the Commission itself might demand. Furthermore, a potential party might hesitate to file a petition to deny in reliance on the prospect of a full hearing, only to find subsequently that a settlement has closed the door. Some control of the settlement process is clearly desirable. Representatives of the affected community and perhaps the Commission could be made indispensable or optional parties to any proposed negotiations, or settlement agreements might be publicized so as to allow opportunity for comment and modification, as is the case with provisionally accepted consent orders in the FTC.⁴⁴⁶

4. Financing Public Advocacy

It is said that although "the doors to greater citizen participation in the affairs of the broadcast media have been opened slightly," a "bias against citizen-initiated criticisms of the broadcasting industry has . . . remained within the structure, procedures and predispositions of the Commission."⁴⁴⁷ The inadequacy of the investigatory staff⁴⁴⁸ and the passivity of the Commission in encouraging general citizen involvement⁴⁴⁹ make independent presentations of views by the affected public important. Various arrangements have been suggested to remedy this state of affairs. Input could be increased "by forging a connection between concerned citizen groups and the competent professional assistance required for more effective participation."⁴⁵⁰ Former Commissioner Cox has urged that a "federation of citizens groups" establish a Washington office to inform constituent groups and act on their be-

⁴⁴⁵ *Id.* Nevertheless, the announced policy of the Citizens Communications Center, "a Washington public interest law firm, which has been representing citizens groups in [FCC] license renewal hearings to assure that broadcasters fulfill their public service obligations," News from the Ford Foundation, Apr. 26, 1972, at 1, is "to negotiate where possible and to withdraw from a proceeding once a licensee has agreed to improve its service." *Id.* 4.

⁴⁴⁶ See notes 614-15 *infra* and accompanying text; cf. 47 C.F.R. § 1.525(b) (2) (1971) (provisions for publication of notice by applicant withdrawing its conflicting application for a construction permit after a private agreement).

⁴⁴⁷ RESPONSES, *supra* note 30, at 61 (statement of Comm'r Johnson); cf. *id.* 64.

⁴⁴⁸ *Id.* 63-64, 70. In fiscal 1968 the FCC received 67,000 complaints, comments, and inquiries, but very few were ever investigated due to limited staff manpower and funds. *Id.* 23 (statement of Chairman Hyde), 54 (statement of Comm'r Cox).

⁴⁴⁹ *Id.* 63 (statement of Comm'r Johnson).

⁴⁵⁰ *Id.* 20 (statement of Chairman Hyde).

The Commission's position generally is to favor representation by counsel of [local groups] which participate in agency proceedings to the end that their presentations may be helpful and effective in making public interest determinations rather than disruptive of [FCC] processes.

Letter from Richard E. Wiley, FCC General Counsel, to the *University of Pennsylvania Law Review*, Sept. 20, 1971.

half.⁴⁵¹ The Commission has debated whether to establish an "Office of Public Counsel" to advise and, in limited circumstances, represent groups. Envisioned as an entity separate from the FCC staff, it would "operate as a private law firm . . . solely as the attorney for citizens' organizations."⁴⁵² Privately endowed institutions such as the United Church of Christ and the Citizens Communications Center (CCC)⁴⁵³ do act to fulfill this function, but both they and smaller local groups lack adequate resources to obtain professional assistance skilled in the intricacies of FCC procedure and to present able arguments for their viewpoints.⁴⁵⁴

Commissioner Johnson recognized several years ago that both the Commission's disinclination to admit representatives of the public interest and economic constraints acted to disenfranchise many groups from participation in FCC proceedings.⁴⁵⁵ A similar observation may obtain in the settlement area. Several months after approval of the agreement in *KCMC*⁴⁵⁶ the licensees agreed to reimburse the Office of Communication for expenses in the amount of \$15,137 incurred in assisting the local associations.⁴⁵⁷ The Commission, though finding no explicit statutory guide, adhered to the proposition "that in no petition to deny situation, whatever the nature of the petitioner, will we permit payment of expenses or other financial benefit to the petitioner."⁴⁵⁸ Though the Commission admitted that the filing of petitions to deny should be facilitated and that settlement of issues is desirable, it nevertheless was of the opinion that payment of expenses was not necessary. The Commission, moreover, found clear detriments to the public interest in the "possibility of abuse—of overpayments . . . or

⁴⁵¹ RESPONSES, *supra* note 30, at 51 (statement of Comm'r Cox).

⁴⁵² Landauer, *FCC H'cighs Proposals to Give Legal Aid to Public Groups on Commission Matters*, Wall St. J., June 29, 1971, at 6, col. 2. Prospects for its establishment, however, seem dim. "We've got enough trouble in court already," one insider contends." *Id.* col. 3.

⁴⁵³ See Citizens' Communications Center, Primer on Citizens' Access to the Federal Communications Commission (1971 Draft). Perhaps one of the most significant activities of the CCC has been to open up private policymaking meetings. See Citizens' Communications Center, Progress Report ii-viii (1971).

⁴⁵⁴ See Landauer, *supra* note 452, col. 3. The Ford Foundation has, however, recently announced a grant of \$400,000 to CCC, intended to cover the salaries of the executive director and 3 attorneys, administration and office expenses, and litigation costs for a period of 2 years. The grant supplements those from a number of smaller foundations such as the Rockefeller Brothers Fund, the Midas International Foundation, and the Stern Family Fund. News from the Ford Foundation, Apr. 26, 1972, at 1, 3.

⁴⁵⁵ RESPONSES, *supra* note 30, at 64 (statement of Comm'r Johnson). Cf. N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 74 (1970).

⁴⁵⁶ See note 440 *supra* & accompanying text.

⁴⁵⁷ *KCMC, Inc.*, 25 F.C.C.2d 603 (1970), *rev'd sub nom.* Office of Communication of the United Church of Christ v. FCC, No. 24,672 (D.C. Cir., Mar. 28, 1972) (*KCMC II*).

⁴⁵⁸ 25 F.C.C.2d at 605. The FCC does, however, have broad powers to "perform any and all acts . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1970); see Reply to Opposition to Request for Reimbursement of Legitimate & Prudent Expenses at 6, Radio Station WSNT, Inc., 31 F.C.C.2d 1080 (1971).

even opportunists motivated to file insubstantial petitions in order to obtain substantial fees" and in the "possibility that settlement of the merits of the dispute might be influenced by the ability to obtain reimbursement of expenses from the licensee."⁴⁵⁹

The court of appeals, in reversing the Commission and approving the payment of such fees as the Commission would find "legitimate and prudent," took a different view of the public interest, saying:

[T]he public interest standard cannot mean that the Commission may totally prohibit reimbursement in all petition to deny situations.

. . . .

. . . . When such substantial results have been achieved, as in this case, voluntary reimbursement which obviously facilitates and encourages the participation of groups like the Church in subsequent proceedings is entirely consonant with the public interest.⁴⁶⁰

The Commission, in a case decided prior to the reversal in *KCMC II*, has also refused to compel reimbursement. In *Radio Station WSNT, Inc.*,⁴⁶¹ the Black Youth Club of Sandersville, Georgia, the Southern Christian Leadership Conference, and several individuals incurred expenses in prosecuting a petition to deny alleging that the licensee had discriminatory programming and hiring practices. The Commission had previously designated WSNT's application for a hearing and had made the petitioners parties to that proceeding.⁴⁶² The licensee and the intervenors subsequently settled, but, unlike *KCMC II*, there was no voluntary agreement by the licensee to reimburse expenses.

⁴⁵⁹ *Id.* at 604. Conversely, the entire renewal process has been characterized as "a burden on broadcasters and a boon for the . . . communications bar." Renewal of Standard Broadcast & Television Licenses for Oklahoma, Kansas & Nebraska, 14 F.C.C.2d 2, 9 (1968).

⁴⁶⁰ Office of Communication of the United Church of Christ v. FCC, No. 24,672, at 11, 18 (D.C. Cir., Mar. 28, 1972) (footnotes omitted). In responding to the FCC's fear of abuse of reimbursement, the court could not find, nor could the Commission demonstrate, any reason why a greater potential for abuse existed in a petition-to-deny situation than in the case of competing applications. *Id.* at 16. It continued:

[T]he public interest is likewise protected from abuse by the Commission's determinations that the public group seeking to withdraw is bona fide, and that the terms of its settlement with the local broadcaster serve the public interest. Once these determinations are made, voluntary reimbursement of legitimate and prudent expenses of the withdrawing group cannot be forbidden.

Id. at 16-17 (footnotes omitted). The court considered the Commission "fully equipped" to make these determinations. *Id.* at 16 n.35.

The court's decision has been reported "as possibly having a far-reaching beneficial effect on the public-interest law movement and its ability to finance its lawsuits." N.Y. Times, Mar. 29, 1972, at 87, col. 3.

⁴⁶¹ 31 F.C.C.2d 1080 (1971), *appeal docketed sub nom.* Turner v. FCC, No. 71-1800, D.C. Cir., Oct. 7, 1971.

⁴⁶² Radio Station WSNT, Inc., 27 F.C.C.2d 993 (1971).

The intervenors argued that the policy of *KCMC II*, which was then awaiting disposition on appeal, should not be dispositive of this case, because "the act of designating a renewal application for hearing constitutes a finding that the petition to deny was meritorious and was not frivolous [and because] the question of reimbursement would be beyond the control of the intervenors or the licensee."⁴⁶³ The Commission rejected the contention that a rule requiring a licensee to bear petitioners' costs when agreement is reached after designation of a hearing would provide the antagonists an incentive to settle quickly; indeed, such a rule could provide a disincentive for petitioning groups to settle prior to designation.⁴⁶⁴

In view of the usual licensee's fundamental aversion to having his renewal application designated for hearing, we are convinced that . . . lack of reimbursement [has] not deterred listener groups from filing petitions to deny or licensees from participating in discussions to resolve their differences . . .⁴⁶⁵

Since the cost of actively participating in the renewal process is almost prohibitively high,⁴⁶⁶ the *WSNT* decision may discourage the filing of further petitions to deny and inhibit the competent negotiation of settlements, "mak[ing] it much more difficult for citizens' groups to become active participants in the regulation of . . . broadcast licenses,"⁴⁶⁷ unless the public intervenor is confident that the licensee is willing to reimburse expenses which will make possible the initiation of subsequent suits. In a renewal process which is "heavily dependent on local residents to call deficiencies to [the Commission's] attention,"⁴⁶⁸ the court's decision to permit at least a voluntary payment of reasonable costs, particularly where the FCC has found that a hearing

⁴⁶³ 31 F.C.C.2d at 1082.

⁴⁶⁴ *Id.* at 1083.

⁴⁶⁵ *Id.* at 1083-84. The Commission had debated only a few months earlier whether to ask Congress to appropriate funds for the payment of expenses to volunteer counsel representing public interest groups. Landauer, *supra* note 452, col. 3. It seems unlikely that the FCC, after refusing to allow individual licensees to reimburse, would itself assume that responsibility.

⁴⁶⁶ The cost of challenging renewal is extremely high. The first *United Church of Christ* proceeding, for example, cost the complainant funds running into six figures. *Hearings on S. 2004 Before the Communications Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., pt. 1, at 121 (1969). The *New York Times* estimated the cost of a proceeding to defeat license renewal at \$250,000. *Id.* 124. See also Fenton, *supra* note 330, at 412. Today, \$350,000-\$400,000 would be a fair estimate for a full scale renewal hearing. See note 425 *supra*.

⁴⁶⁷ Radio Station *WSNT*, Inc., 23 P & F RADIO REG. 2d 53, 58b (Comm'r Johnson concurring in part & dissenting in part); see Brief for Petitioner at 16, Office of Communication of the United Church of Christ v. FCC, No. 24,672 (D.C. Cir., Mar. 28, 1972).

⁴⁶⁸ *KCMC*, Inc., 25 F.C.C.2d 603, 609 (1970); see Brief for Petitioner at 13-14, Office of Communication of the United Church of Christ v. FCC, No. 24,672 (D.C. Cir., Mar. 28, 1972); Reply Brief for Petitioner at 16, Office of Communication of the United Church of Christ v. FCC, No. 24,672 (D.C. Cir., Mar. 28, 1972); cf. note 339 *supra* & accompanying text.

would have been required on the basis of the complainant's petition and settlement results in improved service, does not appear inequitable.⁴⁶⁹ A rule this narrow, or even the broadest possible reading of *KCMC II*—that “when the settlement of issues and termination of a petition to deny . . . is in the public interest, *voluntary* reimbursement of the public group may be allowed”⁴⁷⁰—may, however, have limited value, and the question of voluntariness may ignore the public interest and

⁴⁶⁹ See Brief for Petitioner at 30, 37, Office of Communication of the United Church of Christ v. FCC, No. 24,672 (D.C. Cir., Mar. 28, 1972); Reply Brief for Petitioner at 5, Office of Communication of the United Church of Christ v. FCC, No. 24,672 (D.C. Cir., Mar. 28, 1972).

That voluntariness will long remain a condition precedent to the repayment of expenses is questionable. First, it is clear that the court of appeals in *KCMC II* specifically rejected the FCC's “principle of general application—namely, that in no petition to deny situation, whatever the nature of the petitioner,” would payment be allowed, *KCMC, Inc.*, 25 F.C.C.2d 603, 605 (1970), by stating that “[t]he public interest . . . requires that the Commission's per se rule prohibiting reimbursement be overturned.” Office of Communication of the United Church of Christ v. FCC, No. 24,672, at 17 (D.C. Cir., Mar. 28, 1972). Further, to the extent that *KCMC II* and the policy considerations expressed therein were the precedent governing *WSNT*, a precedent considered by the FCC's Broadcast Bureau as “dispositive of petitioners' request for reimbursement,” Broadcast Bureau's Comment on Comments in Support of Petition for Reconsideration at 4, Radio Station *WSNT, Inc.*, 31 F.C.C.2d 1080 (1971), *KCMC II*'s reversal has left *WSNT* without support in precedent. New criteria for reimbursement must now be articulated.

Concern that “it would be inappropriate . . . to compel reimbursement of expenses in the absence of a voluntary agreement,” *WSNT, Inc.*, 31 F.C.C.2d at 1084, a factor regarded by the Commission as “a separate and independent ground . . . for the denial of the . . . request,” *id.*, and “the foremost distinction between the two cases,” *id.* at 1083, thus becomes the only possible line of distinction, as it indeed was for Chairman Burch, who dissented in *KCMC II*, but who voted with the majority in *WSNT*. See *id.* at 1084 (Chairman Burch, concurring).

Several arguments have been advanced in support of involuntary reimbursement:

1. Public intervenors, as owners of the airwaves seeking to preserve their equity interest, may recover their costs where substantial benefits are realized. Comments in Support of Petition for Reconsideration at 8A, Radio Station *WSNT, Inc.*, 31 F.C.C.2d 1080 (1971) [hereinafter cited as Petitioner's Comments].

2. Where litigation is initiated in response to the misconduct of the licensee, who is trustee of the airwaves, he must bear the expenses of that litigation. *Id.*; 3 A. SCOTT, THE LAW OF TRUSTS §245 (1967).

3. Fears that questions of reimbursement will influence settlements ostensibly on the merits will be assuaged if the Commission requires and regulates reimbursement, objectively evaluating the reasonableness of the claims. Motion for Remand to the Federal Communications Commission at 5, *Turner v. FCC*, appeal docketed, No. 71-1800, D.C. Cir., Oct. 7, 1971.

4. If reimbursement is compelled, licensees will be encouraged to negotiate in good faith so as to minimize expenses while also relieving potentially substantial burdens from the administrative machinery. Petitioner's Comments at 12-13.

5. Perhaps the most important, the statutory scheme of communications regulation requires the facilitation of citizen participation, an objective that reimbursement will surely encourage. *Id.* 8; see Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

The conclusion thus appears inevitable that, whether dictated by established trust principles to which questions of voluntariness do not apply, or by simple adherence to the mandate of protecting the “public interest, convenience, and necessity” despite malaise about the “inappropriateness” of coercing the communications industry, compulsory reimbursement will be established shortly, either by the court or the FCC itself.

⁴⁷⁰ Office of Communication of the United Church of Christ, No. 24,672, at 18 (D.C. Cir., Mar. 28, 1972) (emphasis added).

present potentially burdensome, but not insurmountable, requirements of verification. Furthermore, private settlements without close Commission supervision do present the risk that petitioners may abuse the renewal process in order to exact concessions from licensees anxious to avoid a hearing or other impediment to renewal. Petitioning groups, for example, could make demands extraneous to the proper regulation of the broadcast industry⁴⁷¹ or attempt to induce a licensee to pay for a promise not to file a petition to deny.⁴⁷² The Commission's general reluctance to allow reimbursement to consumer intervenors unless forced by the courts neglects the rational alternative of formulating viable rules which could simultaneously encourage citizen participation and prevent possible abuses of the regulatory processes.⁴⁷³

5. Conclusion

Urged by the courts, the FCC has responded to new definitions of interest, so that virtually any local group or individual residing within a broadcaster's service area is a party in interest competent to compel a renewal hearing upon a proper showing of substantial and material questions about a licensee's past performance. Indeed, the Commission relies upon local reaction as the keystone to effective and continuous regulation. This reliance and the easy access to regulatory processes, while encouraging fuller presentation of substantive issues, does present a potential danger that some individuals or groups will negotiate inequitably with licensees eager to avoid a costly hearing where they risk the loss of a license. The settlement process promises to be an expedient and beneficial mode of regulation, but, like any private regulation, presents risks as well as advantages. The Commission, which has yet to follow the early suggestion in *United Church of Christ* that rules for public participation be formulated,⁴⁷⁴ must face these problems realistically and formulate procedures to encourage the broadest public participation consistent with reasonable agency control over the determination and enforcement of the public interest.

B. Civil Aeronautics Board

Private litigants, usually airlines, cannot be expected to represent any but their own economic interests in CAB proceedings. Nor does it

⁴⁷¹ See *Black Identity Educ. Ass'n*, 21 P & F RADIO REG. 2d 746 (1971) (demand that licensee channel money into the black community, provide scholarships for minority group youths, and employ minority group members on board of directors).

⁴⁷² See *WGN of Colorado, Inc.*, 31 F.C.C.2d 413, 416 (1971) (demand of contribution of \$15,000 to petitioning group in consideration of promise not to press petition to deny).

⁴⁷³ See *KCMC, Inc.*, 25 F.C.C.2d 603, 605-06 (1970) (dissenting opinion of Chairman Burch); *id.* at 611 (dissenting opinion of Comm'r Cox); Brief for Petitioner at 42-43, *Office of Communication of the United Church of Christ v. FCC*, No. 24,672 (D.C. Cir., Mar. 28, 1972).

⁴⁷⁴ Interview with Henry Geller, Special Assistant to the Chairman, FCC, in Philadelphia, Feb. 3, 1972. See text accompanying note 376 *supra*.

seem that the Bureau of Air Operations, which "has the responsibility for developing and presenting the public's position"⁴⁷⁵ at CAB hearings, has concerned itself with more than those same economic considerations.⁴⁷⁶ Since other considerations thus normally lack spokesmen, the provisions made in CAB procedures for public participation become important and it is to be expected that some changes in the CAB's heretofore restrictive intervention policy⁴⁷⁷ will be forthcoming. This section will examine the probable impact of active public participation upon the CAB's present intervention mechanisms and will suggest an accommodation between the liberalized concepts of standing and the fears that greatly increased participation could debilitate the administrative process.⁴⁷⁸

1. Modes of Participation

Three types of CAB proceedings are most likely to attract significant numbers of public interest intervenors. These are route certification proceedings to determine whether, in the interest of the "public convenience and necessity,"⁴⁷⁹ an airline should be permitted a particular freight or passenger route, rate proceedings to ascertain whether fares charged or proposed by air carriers are "just and reasonable,"⁴⁸⁰ and proceedings to approve mergers and acquisitions of control "consistent with the public interest."⁴⁸¹ Except in the case of ratemaking,⁴⁸² hearings are generally mandatory.⁴⁸³

⁴⁷⁵ E. REDFORD, *THE REGULATORY PROCESS* 169 (1969).

⁴⁷⁶ See generally W. FISK, *ADMINISTRATIVE PROCEDURE IN A REGULATORY AGENCY: THE CAB AND THE NEW YORK-CHICAGO CASE* (1965).

⁴⁷⁷ See, e.g., *Fugazy Travel Bureau, Inc. v. CAB*, 350 F.2d 733, 738 (D.C. Cir. 1965) ("[I]t must be shown that the claimant will be adversely affected in a legal or property right.").

⁴⁷⁸ Writers advocating a liberalization of CAB intervention rules have not given due consideration to the validity of some of the objections to such liberalization. See, e.g., Boros, *Intervention in Civil Aeronautics Board Proceedings*, 17 AD. L. REV. 5, 37 (1965).

⁴⁷⁹ 49 U.S.C. § 1371(d)(1) (1970). See generally W. JONES, *THE LICENSING OF DOMESTIC AIR TRANSPORTATION BY THE CIVIL AERONAUTICS BOARD* (1962).

⁴⁸⁰ See 49 U.S.C. § 1374(a) (1970).

⁴⁸¹ 49 U.S.C. § 1378(b) (1970).

Mail-rate proceedings, see 49 U.S.C. § 1376 (1970), are generally conducted through informal negotiations and will not be dealt with in this Comment. Enforcement actions, see *id.* §§ 1487-89, certainly involve the public interest, but, given their quasi-criminal nature, it may be that the Board itself represents the public interest in that type of proceeding. Cf. notes 644-57 *infra* & accompanying text. Furthermore, CAB regulations do provide for informal participation by an "interested person" as well as the formal complainant. See 14 C.F.R. §§ 302.201, 301.214 (1971). For a discussion of the special considerations relating to third party intervention in mail-rate and enforcement proceedings, see Boros, *supra* note 478, at 27-36.

⁴⁸² See notes 489-93 *infra* & accompanying text.

⁴⁸³ Applications for route certification "shall be set for public hearing." 49 U.S.C. § 1371(c) (1970). Applications for approval of mergers, consolidations, and acquisitions must also be set for a hearing, except where "the Board determines that the transaction . . . does not affect the control of an air carrier directly engaged . . . in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing . . ." *Id.* § 1378(b) (emphasis added).

The provisions of the Federal Aviation Act governing public participation in CAB hearings do not differ radically in wording—or in vagueness—from the statutory language governing access to other federal agencies.⁴⁸⁴ The pertinent statutory provisions do not describe those persons who may *actively* participate in hearings. They only direct that “[a]ny interested person may file . . . a protest or memorandum of opposition to or in support of” a carrier’s route application⁴⁸⁵ and that “persons known to have a substantial interest” must be notified of a hearing on a merger proposal.⁴⁸⁶ Subject to the strictures of the APA, the Board has broad latitude to “conduct [its] proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice.”⁴⁸⁷ While the absence of statutory standards has permitted the CAB to devise its own methods of accommodating or foreclosing public participation in a scheduled hearing,⁴⁸⁸ where a hearing is not mandatory, as in the case of ratemaking, the Board is not faced with merely calculating the incremental costs of additional participation but has the opportunity to avoid altogether the public scrutiny of a hearing.

a. Judicial Review and Evasion of Public Participation

The interest of the ratepaying public in achieving meaningful participation in CAB fare proceedings is self-evident. Existing rates may be changed in several ways. An aircarrier may file a tariff proposal,⁴⁸⁹ which automatically will become an effective rate unless the Board, acting upon a complaint or upon its own initiative, suspends and investigates the tariff.⁴⁹⁰ The Board’s decision to use or not to use its sus-

⁴⁸⁴ See Note, *The Law of Administrative Standing and the Public Right of Intervention*, 1967 WASH. U.L.Q. 416, 433 & n.102 (collecting regulatory statutes using the terms “party in interest,” “persons aggrieved,” and the like).

⁴⁸⁵ 49 U.S.C. § 1371(c) (1970).

⁴⁸⁶ *Id.* § 1378(b).

⁴⁸⁷ *Id.* § 1481. Cf. *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967) (“Consolidation, scope of the inquiry, and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts.”) (footnotes omitted).

⁴⁸⁸ The failure to promulgate effective agency standards has been called the “malaise of the administrative process.” *City of Lawrence v. CAB*, 343 F.2d 533, 587 (1st Cir. 1965).

⁴⁸⁹ 49 U.S.C. § 1373 (1970).

⁴⁹⁰ *Id.* § 1482(g). Any person may attempt to initiate a CAB proceeding by filing a complaint. “If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of . . . the Board to investigate the matters complained of. Whenever . . . the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without a hearing.” *Id.* § 1482(a). The Bureau of Enforcement has a consumer complaint section that receives complaints about unsatisfactory service; the complainant does not actively participate in the investigation of alleged violations but does become a formal party to any proceedings that may be instituted. Refusals to institute formal complaint proceedings may be reviewed by the full Board. See *RESPONSES*, *supra* note 30, at 7. A dismissal of a complaint without a hearing and the refusal to investigate is reviewable by courts only for an abuse of discretion. See *Transcont-*

pension power is not judicially reviewable.⁴⁹¹ The Board may itself prescribe rates by proceeding to a hearing,⁴⁹² considering a set of statutory criteria,⁴⁹³ and formulating a final order, which may be judicially contested "by any person disclosing a substantial interest in such order."⁴⁹⁴

The difficulty encountered by representatives of the public seeking an opportunity to participate in ratemaking proceedings may be seen in *Moss v. CAB*.⁴⁹⁵ In *Moss* several trunkline carriers filed for an increase in passenger fares after meeting informally with the Board. Having been denied access to a private conference, thirty-two congressmen complained "about the Board's continued *ex parte* meeting and rate practices and urged the Board to suspend the tariffs, to institute a general passenger fare investigation to define more clearly the statutory rate-making standards, and finally to set reasonable rates based on these more precise standards."⁴⁹⁶ The petitioners refused, however, to engage in an oral argument on the advisability of the use of the agency's investigatory and suspension powers "on the ground that the Board's decision on the rate increases had already been made."⁴⁹⁷ The Board thereafter did suspend the proposed tariffs but, on its own initiative, set forth its own fare formula "and announced its decision to 'permit tariff filings implementing' that formula to be filed without suspension, thus assuring almost immediate effectiveness."⁴⁹⁸ The carriers of course adopted the proposed rate formula, and the congressmen's subsequent request that the CAB suspend and investigate these new rates was, predictably, denied.⁴⁹⁹

On appeal the narrow issue was whether the Board effectively determined the rates and thus should have followed the statutory procedures of notice and hearing required for Board-made rates.⁵⁰⁰ The broader issue framed by Judge Wright of the District of Columbia Circuit was "the recurring question which has plagued public regulation of industry: whether the regulatory agency is unduly oriented toward

mental Bus Sys., Inc. v. CAB, 383 F.2d 466, 478 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); Flight Engineers' Int'l Ass'n v. CAB, 332 F.2d 312, 314 (D.C. Cir. 1964); Pan American-Grace Airways, Inc. v. CAB, 178 F.2d 34, 36 (D.C. Cir. 1949). Cf. notes 404-11 *supra* & accompanying text. See also Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 484, 512-13, 520-21 (1940).

⁴⁹¹ See Spritzer, *supra* note 263, at 97-100. See also Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963).

⁴⁹² 49 U.S.C. §§ 1482(d), (g) (1970).

⁴⁹³ *Id.* § 1482(c).

⁴⁹⁴ *Id.* § 1486(a).

⁴⁹⁵ 430 F.2d 891 (D.C. Cir. 1970). See Note, *Some Observations on Moss v. CAB*, 23 STAN. L. REV. 833 (1971); Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 200-09.

⁴⁹⁶ 430 F.2d at 894.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.* at 894-95 (footnote omitted).

⁴⁹⁹ *Id.* at 895.

⁵⁰⁰ *Id.*

the industry it is designed to regulate, rather than the public interest it is designed to protect." ⁵⁰¹ The *Moss* court found that "[t]he Board did all it could, short of formally styling its order as rate-making, to induce the carriers to adopt the proposed rates," ⁵⁰² that the exclusion of the public from the ratemaking process in these circumstances was contrary to the governing statute, and that "observance of safeguards designed to protect the public *before* the rates are imposed is imperative." ⁵⁰³ Preeminent among those safeguards is the necessity of a hearing record considering all relevant variables, so that a reviewing court can determine whether the statutory ratemaking criteria have been met. ⁵⁰⁴

The full implications of *Moss* have not yet been made clear, but the court "emphatically [rejected] any intimation by the Board that its responsibilities to the carriers are more important than its responsibilities to the public." ⁵⁰⁵ The court's admonition and its insistence that the Board remain faithful to the procedures of its organic statute may, however, alter little in substance if the Board is equally persistent in its industry orientation. ⁵⁰⁶ The extent of agency-industry negotiation and collaboration in the formulation of rates ⁵⁰⁷ and the fine, almost imperceptible line between carrier-made and agency-made fares ⁵⁰⁸ make judicial intervention an uncertain curative. ⁵⁰⁹

b. *Participation as Parties*

Rule 15 of the CAB's rules of practice governs "formal" intervention in hearings as a full party. ⁵¹⁰ Though full party status must be accorded anyone found to have a "statutory right to be made a party," ⁵¹¹ there is no helpful definition of such a right and the Board,

⁵⁰¹ *Id.* at 893. Judge Wright in large measure echoed the sentiments of a former chairman of the Board who felt "that there has been an undue shift of emphasis from public convenience and necessity to the seeking and protection of private carrier rights." Rizley, *Some Personal Reflections After Eight Months as Chairman of the Civil Aeronautics Board*, 22 J. AIR L. & COM. 445, 450 (1955) (emphasis in original).

⁵⁰² 430 F.2d at 898.

⁵⁰³ *Id.* at 902 (emphasis in original).

⁵⁰⁴ *See id.*

⁵⁰⁵ *Id.* While the court intimated that it would be sympathetic to the use of relaxed procedures in emergencies, even those rates cannot be set without a public hearing. *Id.* at 901-02. The Board has "consistently refused to permit intervention in temporary rate proceedings." Northwest Airlines, Inc., Mail Rates, 12 C.A.B. 838, 839 (1951).

⁵⁰⁶ *See* Note, *supra* note 495, at 841-45.

⁵⁰⁷ *See* Spritzer, *supra* note 263, at 77; W. JORDAN, AIRLINE REGULATION IN AMERICA: EFFECTS AND IMPERFECTIONS 71 (1970). *Cf.* E. REDFORD, *supra* note 475, at 148-49, 246-47.

⁵⁰⁸ *See* Spritzer, *supra* note 263, at 82-83.

⁵⁰⁹ *See* 430 F.2d at 900; Project, *supra* note 495, at 208.

⁵¹⁰ 14 C.F.R. § 302.15 (1971).

⁵¹¹ *Id.* § 302.15(a).

at least prior to 1965, never encountered a petitioner with one.⁵¹² Rule 15 further provides that "[a]ny person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of [a hearing] may be permitted to intervene."⁵¹³ The rule also sets forth criteria to guide the exercise of the discretionary power to grant or deny formal intervention.⁵¹⁴

In terms of the number of attempted interventions, members of the regulated industry,⁵¹⁵ affected unions,⁵¹⁶ and civic intervenors⁵¹⁷—cities, states, and other political subdivisions—are the most noticeable, particularly in route and merger proceedings. The criterion governing intervention has generally been whether the petitioner possesses a substantial economic interest that might be affected by a decision.⁵¹⁸ The economic interest of an "on-line" city, one within the area of service under consideration, is so apparent that such cities formerly encountered

⁵¹² See Boros, *supra* note 478, at 16; cf. American-Western Merger Case, Order Granting and Denying Petitions for Leave to Intervene, No. 71-3-42, Docket 22,916 (CAB, Mar. 5, 1971) (denying formal intervention to a group of law students designating themselves as FLITE [Future Lawyers Investigating Transportation Employment] because they failed to establish a statutory right to be made a party and had no other interest).

⁵¹³ 14 C.F.R. § 302.15(a) (1971). The courts have approved this rule, specifically rejecting the assertion that interested persons have a *right* to participate as full parties in CAB proceedings and holding that rule 15 intervention remains within an examiner's and the Board's discretion. See Palisades Citizens Ass'n v. CAB, 420 F.2d 188, 193 (D.C. Cir. 1969); City of San Antonio v. CAB, 374 F.2d 326, 331 (D.C. Cir. 1967).

⁵¹⁴ 14 C.F.R. § 302.15(b) (1971). The seven considerations relevant to a determination of the merits of a petition to intervene are:

- (1) the nature of the petitioner's right under the statute to be made a party to the proceeding;
- (2) the nature and extent of the property, financial or other interest of the petitioner;
- (3) the effect of the order which may be entered in the proceeding on petitioner's interest;
- (4) the availability of other means whereby the petitioner's interest may be protected;
- (5) the extent to which petitioner's interest will be represented by existing parties;
- (6) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and
- (7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.

⁵¹⁵ See, e.g., Caribbean-Atlantic Airlines, Inc.-Eastern Air Lines, Inc., Acquisition Case, Order Granting and Denying Petitions for Leave to Intervene, No. 70-12-153, Docket 22,690 (CAB, Dec. 30, 1970).

⁵¹⁶ See, e.g., *id.*; American-Trans Caribbean Merger, Intervention Order, No. 70-4-33, Docket 21,828 (CAB, Apr. 8, 1970).

⁵¹⁷ See, e.g., City of San Antonio v. CAB, 374 F.2d 326 (D.C. Cir. 1967); City of Houston v. CAB, 317 F.2d 158 (D.C. Cir. 1963); Southern Transcontinental Serv. Case, 39 C.A.B. 896 (1964); Eastern-Colonial, Acquisition of Assets, 18 C.A.B. 453 (1954) (43 civic bodies intervened).

⁵¹⁸ See City of Houston v. CAB, 317 F.2d 158, 160 (D.C. Cir. 1963); Chicago-Acapulco Nonstop Serv. Investigation, Order Granting Intervention, No. 71-3-26, Docket 22,956 (CAB, Mar. 4, 1971); On-Route Charter Authority of Foreign Air Carrier Permits, Intervention Order, No. 71-3-22, Docket 22,362 (CAB, Mar. 3, 1971).

little difficulty in securing full party rights.⁵¹⁹ In the case of "off-line" cities and, of late, even cases involving on-line cities, however, the CAB has been more restrictive, denying intervention either because civic intervenors can utilize alternative means of participation⁵²⁰ or because their interests in the proceeding are too remote.⁵²¹ Though to date no political subdivision has sought intervention on strictly noncommercial grounds, it is conceivable that, in this time of growing concern with the environment, a municipality, county, or state may attempt to put in issue the impact of a merger or route certification upon population congestion or noise pollution. The clear trend of recent federal decisions is to confer standing in such situations,⁵²² but, in light of the CAB's heavy reliance on finding a financial or property interest as a basis for formal intervention, it is not clear that it would readily acknowledge a noneconomic interest.⁵²³

c. *Informal Participation*

Rule 14 of the CAB's principles of practice,⁵²⁴ which governs participation by non-principals in hearings, states in part that

[a]ny person, including [political units of a state], may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the examiner or the Board . . . such person may also cross-examine witnesses directly. Such persons may also present to the examiner a written statement on the issues⁵²⁵

Persons granted intervention under rule 14 are not parties but are more properly termed "informal" intervenors. There was little difference between the rights of informal and formal intervenors until 1961, when the regulations were changed to their present form, resulting in the extinguishment of a rule 14 participant's rights after the hearing before

⁵¹⁹ See W. Fisk, *supra* note 476, at 35 (noting that 30 intervenors, mostly "on-line" cities, were granted intervention in a 1953 route proceeding).

⁵²⁰ See Boros, *supra* note 478, at 26 (noting that petitions to intervene in the *United-Capital Merger* case were denied on the ground that the communities could protect their interests as "informal" participants).

⁵²¹ See *American-Eastern Merger*, 36 C.A.B. 874, 875 (1962) (denying the city of Houston permission to intervene based upon a finding that the city "failed to disclose a property, financial, or other substantial interest in the proceeding"), *rev'd per curiam*, *Houston v. CAB*, 317 F.2d 158 (D.C. Cir. 1963) (holding Houston did have "substantial interest" since, though not served by the merging carriers, it had a competing interest with Dallas, which was so served).

⁵²² See notes 33-120 *supra* & accompanying text.

⁵²³ See note 518 *supra* & accompanying text. Certainly where the civic party is geographically remote from the affected area of the proposed action, intervention may be denied.

⁵²⁴ 14 C.F.R. § 302.14 (1971).

⁵²⁵ *Id.* § 302.14(b).

an examiner.⁵²⁶ Formal parties now have significant advantages, particularly in terms of their ability to appear before the Board itself. Only full parties have a right to request oral argument before either the Board or the examiner,⁵²⁷ to petition for discretionary review by the Board of an examiner's initial decision,⁵²⁸ and to file exceptions to the examiner's recommended decision or to a tentative decision by the Board.⁵²⁹ Whereas rule 14 intervenors must file written statements on the issues before all of the evidence is received, full parties may file briefs with the examiner or the Board after the hearing record is complete.⁵³⁰ Full party status, however, is not a prerequisite to judicial review, which is available to "any person disclosing a substantial interest" in the subject matter of an order.⁵³¹ That the extent of participation by an intervenor under rule 14 is confined to the initial hearing and largely turns upon the will of the examiner is of unquestionable significance.⁵³² Relegation to rule 14 status might deprive a public intervenor of the important ability to fully pursue its interest through both the hearing and appeal process to the Board.

In *Palisades Citizens Association v. CAB*,⁵³³ several associations of citizens, styling themselves "Concerned Citizens," sought formal or, alternatively, informal intervention in a certification hearing on a proposed helicopter route in the Baltimore-Washington area. The Citizens alleged in substance that their participation would help insure that the record would reflect the environmental impact of the proposed service. The petitioners did not seek to introduce their own evidence on the adverse environmental consequences of certification but, rather, demanded that the carrier applicants be compelled to make studies and adduce such evidence.⁵³⁴ Considering the criteria provided by rule

⁵²⁶ See Boros, *supra* note 478, at 16.

⁵²⁷ See 14 C.F.R. §§ 302.25, 302.32 (1971).

⁵²⁸ See *id.* § 302.28.

⁵²⁹ See *id.* § 302.30.

⁵³⁰ See *id.* §§ 302.26, 302.31.

⁵³¹ Compare 16 U.S.C. § 8551(b) (1970) (Federal Power Act) and 15 U.S.C. § 717r(b) (1970) (Natural Gas Act) with 49 U.S.C. § 1486(a) (1970) (Federal Aviation Act). See Brief for Respondent at 24, *Palisades Citizens Ass'n v. CAB*, 420 F.2d 188 (D.C. Cir. 1969) [hereinafter cited as Brief]; Shapiro, *supra* note 37, at 767. On the other hand, the grant of formal intervention is "for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Board that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order." 14 C.F.R. § 302.15(d).

⁵³² See Comment, *Adequacy of Domestic Airline Service: The Community's Role in a Changing Industry*, 68 YALE L.J. 1199, 1218 n.93 (1959) (quoting address by Perry H. Taft, National Airport Conf., Nov. 3, 1957, indicating that a community, to be successful before the CAB, must participate in all stages of the proceedings). The advantages inherent in the opportunity to argue orally before the Board, as opposed to simply participating before the examiner, are suggested by the description or oral arguments in the *New York-Chicago* case. See W. FISK, *supra* note 476, at 75.

⁵³³ 420 F.2d 188 (D.C. Cir. 1969).

⁵³⁴ *Id.* at 190.

15,⁵³⁵ the Board affirmed the examiner's denial of formal intervention in favor of rule 14 participation. The Board found that, though "interested persons" have a right to file written position statements,⁵³⁶ the petitioners had no statutory right to actively participate in the proceedings,⁵³⁷ that the petitioners' interest was not uniquely identifiable apart from the general public's,⁵³⁸ that the Department of Transportation, which was allowed party status, would be the principal public spokesman for representing the petitioners' concerns,⁵³⁹ that the petitioners would not themselves affirmatively offer any evidence concerning environmental impact,⁵⁴⁰ and that if the Citizens were allowed to participate as parties the proceedings would be "nearly uncontrollable."⁵⁴¹ The Board concluded that informal rule 14 participation "strikes the practical balance between the general public's interest in viable administrative proceedings and the private interests of individual members of the general public."⁵⁴²

The court on appeal recognized the relevance of environmental concerns and acknowledged the Citizens' "keen interest" in the proceedings, but sustained the Board's denial of formal intervention.⁵⁴³ The *Palisades* court's reasons for upholding the denial of intervention brings into relief perhaps the major difficulty that will confront public interest groups attempting to intervene as parties in Board hearings. The Citizens were not denied all opportunity to participate in the route proceeding; rather, they were granted quite generous privileges as informal intervenors. In this capacity they were allowed to present exhibits, to file a written statement of their position, to cross-examine extensively, and to argue orally before the examiner.⁵⁴⁴ In light of these privileges, the court felt that the Citizens' role "amounted to a reduction of [their] status in form only, rather than in substance."⁵⁴⁵ The salient question raised by this decision is whether the informal status afforded the Citizens, readily accepted by the court as a representative environmentalist group,⁵⁴⁶ adequately protects the public's interest in the environment.⁵⁴⁷

⁵³⁵ See note 514 *supra*.

⁵³⁶ See note 485 *supra* & accompanying text.

⁵³⁷ See Brief, *supra* note 531, at 26-27; cf. *City of San Antonio v. CAB*, 374 F.2d 326, 331 (D.C. Cir. 1967).

⁵³⁸ Brief, *supra* note 531, at 27-28.

⁵³⁹ *Id.* 30-31. Cf. *American-Trans Caribbean Merger, Intervention Order*, No. 70-4-33, Docket 21,828 (CAB, Apr. 8, 1970).

⁵⁴⁰ Brief, *supra* note 531, at 31.

⁵⁴¹ *Id.* 33; 420 F.2d at 191.

⁵⁴² Brief, *supra* note 531, at 33; 420 F.2d at 191.

⁵⁴³ 420 F.2d at 193.

⁵⁴⁴ *Id.* See Brief, *supra* note 531, at 11.

⁵⁴⁵ 420 F.2d at 193.

⁵⁴⁶ Although the Concerned Citizens were private property owners, the court largely ignored that fact, choosing to look upon the group as a potential representative of the public interest in the environment. See *id.* at 190.

⁵⁴⁷ See Brief, *supra* note 531, at 35-38 (statement of the Department of Justice to the effect that the petitioners should have a legal right to intervene as parties).

To the extent that *Palisades* sanctions a general Board policy of denying rule 15 rights to public intervenors,⁵⁴⁸ thereby foreclosing direct access to the Board, it effectively accommodates some of the concerns which led to the 1961 rule change.⁵⁴⁹ One of the objections to full participation by third party groups centered upon the tendency of often inept civic intervenors to encumber the hearing and review procedures with poorly prepared presentations.⁵⁵⁰ Another frequently encountered objection has been that full intervention by such parties tends to protract and enlarge hearings to unmanageable proportions.⁵⁵¹ The likelihood of such time consumption is substantiated by the fact that ninety-five percent of CAB hearing time is consumed by cross-examination and re-cross-examination,⁵⁵² and an increase in the number of full parties possessing the right to cross-examine might well lead to a geometric increase in expended hearing time.

The considerations against allowing public interest groups full rule 15 intervention are not to be taken lightly. Numerous civic parties or

⁵⁴⁸ The Board policy on allowing intervention has been restrictive. "Perhaps, this [1961] rule change would not have been so unfortunate had the Board adopted a more liberal approach to permitting intervention under Rule 15. It has not done so. Intervention has been more sparingly granted than formerly." Boros, *supra* note 478, at 17 (footnote omitted). The Board itself, however, has said that its "regulations and its generally liberal approach in their administration have encouraged citizen-group input." RESPONSES, *supra* note 30, at 5-6.

⁵⁴⁹ One of the chief reasons for the 1961 rule change, not applicable to the broad question of public interest group intervention, was CAB concern over frequent appearances at Board hearings by congressmen, senators, and state officials seeking to place overt political pressure upon the decisionmaking process. See Boros, *supra* note 478, at 16-17. See also Rizley, *supra* note 501, at 450.

⁵⁵⁰ See Boros, *supra* note 478, at 21. But cf. W. FISK, *supra* note 476, at 41 (recounting the preparation of a "fairly typical civic intervenor" in the 1953 New York-Chicago route certification case).

⁵⁵¹ See, e.g., SENATE SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, 89TH CONG., 2D SESS., QUESTIONNAIRE SURVEY ON DELAY IN ADMINISTRATIVE PROCEEDINGS 32 (Comm. Print 1966) [hereinafter cited as QUESTIONNAIRE]; City of San Antonio v. CAB, 374 F.2d 326, 332 (D.C. Cir. 1967) ("[T]he Board found that there were already at least 65 parties to the proceeding, and to allow petitioners and cities similarly situated to intervene would in effect defeat the very purpose of the consolidation order which, of course, was to keep the proceeding within manageable limits."). In Riddle Airlines, Inc., 28 C.A.B. 15 (1958), the Board allowed the L.B. Smith Aircraft Corp. oral argument to protest the granting of a subsidy to a competitor, but denied a petition to intervene, stating that "[i]t does not appear that Smith's participation may reasonably be expected to assist in the development of a sound record, nor does it appear that Smith has an interest which could not adequately be served by participation in the proceeding pursuant to rule 14 of the Board's rules of practice. Moreover, Smith's participation as an intervenor would broaden the issues herein and delay the proceeding." *Id.* at 21. The view that a liberal intervention policy will unnecessarily delay proceedings has been called "one of the most oft-repeated myths" in the CAB. Boros, *supra* note 478, at 21. The Board itself feels that its "decision-making procedures operate with reasonable speed considering the breadth and complexity of the issues involved." RESPONSES, *supra* note 30, at 11.

⁵⁵² Pfeiffer, *Shortening the Record in CAB Proceedings Through Elimination of Unnecessary and Hazardous Cross-Examination*, 22 J. AIR L. & COM. 286, 287 (1955). Cf. W. JONES, *supra* note 479, at 122 ("Everyone seems to agree that cross-examination often is excessive . . ."). The procedural rules require that direct evidence be presented in written form whenever feasible. See 14 C.F.R. § 302.24(h) (1971). This is in harmony with the APA, which compels only "such cross-examination as may be required for a full and fair disclosure of the facts." 5 U.S.C. § 556(d) (1970).

more than one environmentalist group can be expected to adduce repetitive and often immaterial evidence. A right of cross-examination is also subject to abuse, and the more parties possessing the right, the more potential for dilatory abuse exists. Furthermore, the necessity of wading through the additional briefs and a copious hearing record, which would result from the granting of full intervention to third parties, would add to the delay plaguing CAB proceedings.⁵⁵³ It certainly must be conceded that to have fewer parties in any particular proceeding will, to some degree, expedite the disposition of the matter at hand,⁵⁵⁴ but expediency in itself should not be a legitimate ground for foreclosing participation.⁵⁵⁵

In addition to these considerations, the evidence an environmentalist group can be expected to introduce at a hearing will often fall within the ambit of what Professor Davis calls "legislative fact" or "general facts which help the tribunal decide questions of law and policy and discretion."⁵⁵⁶ In *Palisades*, for example, the Concerned Citizens argued that investigation would prove "that helicopters pollute the air far more per passenger mile than automotive vehicles."⁵⁵⁷ The advisability of allowing cross-examination of evidence bearing on such issues has been seriously questioned.⁵⁵⁸ Such policy matters involving legislative fact may be better decided through the rulemaking than the adjudicatory process.⁵⁵⁹ Even in those situations where the environmental considerations introduced are clearly adjudicatory in nature, the vast majority of such facts would seem to lend themselves well to presentation by exhibits, statistics, and written statements. It is, therefore, at least questionable whether cross-examination and other procedures attendant to full party status need be universally available.

⁵⁵³ See Boros, *supra* note 478, at 22 (indicating that in excess of 1 year generally expires between the examiner's initial decision and the Board's decision in certification cases).

⁵⁵⁴ It is impossible to say with certainty just how much effort the Board typically expends in going through the hearing record, as very little is known about the internal workings of the Board itself. See W. FISK, *supra* note 476, at 76 (referring to the deliberations of the Board as "the most important, the most interesting, and the most obscure" aspect of a CAB proceeding); cf. RESPONSES, *supra* note 30, at 10.

⁵⁵⁵ See Boros, *supra* note 478, at 22; Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364, 367-68 n.1 (D.C. Cir. 1959).

⁵⁵⁶ 1 K. DAVIS, *supra* note 23, § 7.02, at 413.

⁵⁵⁷ See Harkaway, *Air Pollution—The Federal Power Commission and Other Federal Agencies*, 3 NAT. RES. LAW. 66, 71 (1970). The Board rejected the contention, but there will undoubtedly "be considerably more air pollution evidence offered into its proceedings in the future." *Id.* 72.

⁵⁵⁸ See Pfeiffer, *supra* note 552, at 296-97; W. JONES, *supra* note 479, at 122.

⁵⁵⁹ But cf. Robinson, *supra* note 191, at 521. See also Clagett, *supra* note 198, at 77-80 (suggesting flexible procedural devices).

The problem of policy-oriented cross-examination will not normally arise in the rulemaking context, inasmuch as the Administrative Procedure Act's rulemaking provisions do not require the holding of a full evidentiary hearing. See 5 U.S.C. §§ 553(c), 556(d) (1970). Where the Board's order has "future effect" . . . of both general and particular applicability," only the opportunity to submit written data and argument by the interested parties is required. *Law Motor Freight, Inc. v. CAB*, 364 F.2d 139, 143 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967).

Notwithstanding the foregoing conclusion, it is possible that, in particular circumstances, participation limited by the strictures of rule 14 will not adequately air the public interest before the Board. In *Palisades* the Board did weigh the question of environmental impact against the need for helicopter service, finding the latter consideration persuasive.⁵⁶⁰ The Board's final decision undertook a discussion of each point raised by the Citizens, disposing of each in a reasonable fashion.⁵⁶¹ The *Palisades* court seemed to think that the Department of Transportation, as a formal intervenor, actively represented environmental concerns throughout the certification proceeding.⁵⁶² There is no assurance, however, that future Boards will treat public interest groups as fairly or that there will be existing adequate representation as a matter of course,⁵⁶³ especially as economic considerations dominate Board and examiner hearings. In light of governmental opposition to environmentalist groups in other agency proceedings,⁵⁶⁴ the most vigorous, effective, and faithful representation of the environmentalist position can hardly be expected over a range of cases. The notion that the agency charged with conducting a hearing adequately protects the public interest has been rejected.⁵⁶⁵ Relegation to rule 14 status without a discretionary broadening of the party's rights may not provide for a fair and full appraisal of significant aspects of the public interest. Rationalization about surrogate representation and concern with unduly extended proceedings cannot obscure the possibility that rule 14 could be employed to circumvent the broad purpose of *Moss* by effectively excluding the public from the CAB decisional process.⁵⁶⁶

2. A Proposal

Against the backdrop of these competing considerations—the desirability of expeditious procedure and the need for full consideration

⁵⁶⁰ 420 F.2d at 193. See also Glass, *Planning for Suburban Heliports*, 22 J. AIR L. & COM. 271, 281 (1955) (including among the factors to be considered in selecting heliport sites the "[p]ossible effect on use of neighboring property as a result of noise of helicopter operations and air blast effects.").

⁵⁶¹ 420 F.2d at 193 n.7.

⁵⁶² See *id.* at 193. The Department of Transportation had, however, no "scientifically acceptable basis for estimating the extent of helicopter air pollution." Harkaway, *supra* note 557, at 71-72.

⁵⁶³ The Board has not appointed any citizen advisory groups, but trade and industry groups do advise the Board on their special fields of interest. "The information derived through exchanges with such groups provides the Board with an informed basis for carrying out policy-making and decision-making functions." Furthermore, the Board does not "seek out the views of persons who would not otherwise be likely to present their views to the Board." RESPONSES, *supra* note 30, at 6. The Board does claim, however, "that those persons that are affected by the Board's activities know enough about them" by means of notice and distribution of information. *Id.* 8.

⁵⁶⁴ See, e.g., *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom.* *Sierra Club v. Morton*, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972) (action for declaratory judgment and injunction against Secretaries of Interior and Agriculture brought by environmentalist group).

⁵⁶⁵ See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966).

⁵⁶⁶ See notes 495-509 *supra* & accompanying text.

of the public interest—*Palisades* suggests an intervention scheme that may effectively accommodate the broad spectrum of interests affected by CAB activity. The court in that case did not approve the simple consignment of the Citizens to a status strictly limited by the language of rule 14, for the petitioners enjoyed more rights than rule 14 minimally confers.⁵⁶⁷ In addition to the presentation of exhibits and a written statement of the issues, the Citizens were granted the discretionary privileges of cross-examination and oral argument before the examiner.⁵⁶⁸ In light of those privileges, the court's statement that the Citizens' position under rule 14 was "a reduction of . . . status in form only"⁵⁶⁹ is more convincing. When compared, for example, with restrictive limitation on participation allowed nonparties in AEC proceedings,⁵⁷⁰ it is apparent that rule 14, as employed in *Palisades*, does not preclude a reasonable solution to the problem of public interest intervention.

If rule 14 status was indeed a handicap in form only, the question remains whether there was any reason not to grant the Citizens rule 15 status. The obvious answer is that there was. Even if the court's assertion that "that which might have been accomplished under Rule 15 was, in fact, effected through Rule 14"⁵⁷¹ cannot be taken as wholly true, the court did lend its imprimatur to the flexibility shown by the examiner and the Board in that particular case in conferring upon the Citizens privileges not even mentioned in rule 14.⁵⁷² The court unfor-

⁵⁶⁷ See text accompanying notes 544-45 *supra*.

⁵⁶⁸ See 420 F.2d at 193.

⁵⁶⁹ *Id.*

⁵⁷⁰ See text accompanying notes 851-52 *infra*.

⁵⁷¹ 420 F.2d at 193.

⁵⁷² The Board recently denied a petition to intervene as a party filed by the Aviation Consumer Action Project (ACAP) but, in addition to permitting rule 14 participation, "determined to permit ACAP to file a post-hearing brief or statement of position with the examiner and in the event of further proceedings to file a brief or statement of position with the Board and to participate in any oral argument which may be ordered." American-Western Merger Case, Order at 1, No. 71-11-43, Docket 22,916 (CAB, Nov. 11, 1971). The Board thought that its unusual action would not unduly burden the proceedings and "could, moreover, prove helpful in this case since . . . ACAP is the only participant of its type in the proceeding. [The Board emphasized], however, that this limited permission (which does not constitute formal intervention) is being granted solely as a matter of grace, and is not to be taken as a precedent, either under Rule 15 or otherwise." *Id.* at 3. The Board warned that "neither the Federal Aviation Act nor the courts have placed on the Board the requirement of permitting formal intervention . . . to groups which have no direct and substantial economic interest in the proceeding at hand and which may in reality turn out to consist of no more than one or a few individuals." *Id.* at 3 n.6. Commenting upon ACAP's failure to show that it would be a responsible spokesman for "a broadly based organization representing a significant segment of the public," the Board said that it would "expect future petitions to intervene from this and other such groups to provide more detailed information to permit us to ascertain whether formal intervention, as opposed to Rule 14 participation, is appropriate." *Id.*

ACAP had filed an untimely petition, but claimed that it was entitled as a "public body" to a more lenient filing deadline. See 14 C.F.R. § 302.15(c)(2)(iii) (1971). The Board rejected this contention, stating that the filing exception was intended to benefit local government bodies which "frequently find it difficult to meet the generally applicable deadline because of lack of familiarity with federal agency procedure, lack

unately evinced no apprehension that this flexibility might not be so wisely utilized in future cases. Unlike rule 15, whose seven criteria⁵⁷³ at least provide a skeletal guide to the exercise of the examiner's discretion in weighing a petition for formal intervention, rule 14 does not indicate what factors should determine the scope of the privileges, if any, to be accorded a rule 14 intervenor. The court's opinion in *Palisades* concludes with the hedging assertion that "[i]t is for the Board to determine who will best serve to amplify the facts pertinent to [the public] interest" ⁵⁷⁴ Given the absence of standards to guide that determination, there is no assurance that the relatively equitable solution reached in *Palisades* often will be repeated.

The APA provides that the reasons underlying an agency's findings or conclusions shall be shown on the record,⁵⁷⁵ and any failure to do so may constitute reversible error.⁵⁷⁶ At a minimum, rule 14 should contain a set of criteria similar in purpose to those found in rule 15. The grant or denial of an informal intervenor's privileges could be weighed against these standards, and the scope of any grant could be tailored to the needs of the intervenor in each particular case. To facilitate review of contested denials of privilege and to insure that each intervenor is dealt with as flexibly as were the Citizens, the reasons underlying the examiner's or Board's action should be articulated. As presently drafted, rule 14 invites a stream of *Palisades*-like appeals attacking Board action as arbitrary or as lacking articulated reasons. Intelligible standards controlling the evidentiary and appellate⁵⁷⁷ privileges granted the rule 14 intervenor can insure fairness with some regularity.

To achieve this result, rule 14 could be restructured by adding a subsection (c) providing that:

- 1) After determining that the facts do not warrant a person's formal intervention as a full party under rule 15 but that limited participation under this rule is warranted, the examiner (or the Board) may, in the exercise of discretion, allow the person so participating under this rule one or more of the following privileges:

of information about prehearing conferences in proceedings in which they might have an interest, the frequent need to locate and employ special legal counsel for the purpose, and other similar factors." Order at 2. The Board found that ACAP was a national organization with knowledgeable counsel, but intimated that other local nongovernmental groups might be eligible for the relaxed filing requirements in the future. *Id.* at 2 & n.3.

⁵⁷³ See note 514 *supra*.

⁵⁷⁴ 420 F.2d at 193. Cf. *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967); *Frontier Airlines, Inc. v. CAB*, 349 F.2d 587, 591 (10th Cir. 1965).

⁵⁷⁵ 5 U.S.C. § 557(c) (1970).

⁵⁷⁶ See, e.g., *City of Lawrence v. CAB*, 343 F.2d 583, 588 (1st Cir. 1965); *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579 (1st Cir. 1964).

⁵⁷⁷ "Appellate" here refers to those stages of a Board proceeding occurring after an examiner's initial decision.

- i) the opportunity to cross-examine witnesses;
 - ii) the opportunity to argue orally before the examiner and/or the Board;
 - iii) the opportunity to file exceptions to one or more findings of fact or conclusions of the examiner or the Board; and
 - iv) the opportunity to present to the examiner and/or to the Board a brief prepared after the termination of the examiner's hearings.
- 2) In passing upon petitions by persons seeking these privileges, the following factors, among others, will be considered:
- i) the necessity of balancing the considerations to be advanced by the person participating under this rule with those advanced by other participants;
 - ii) the possibility that the Board may not be as familiar with the hearing record as with the factual and policy considerations presented directly by means of brief and/or oral argument;
 - iii) the presumption in favor of non-duplicative testimony, argument, and cross-examination, provided that relevancy to the issues at hand has been established; and
 - iv) the extent to which formal parties to the proceedings can reasonably be expected to represent adequately the interests of the rule 14 participant at each and every stage of the proceeding.

Given the CAB's widespread use of the prehearing conference,⁵⁷⁸ the examiner has the opportunity, by fixing the "ground rules" of the impending hearing, to make a fair and thorough determination of which privileges to grant. Certainly much can be done at the conference to ascertain what evidence will be cumulative or irrelevant, where the examiner might benefit from cross-examination by the various parties, and which issues might be fully presented only by brief and oral argument.⁵⁷⁹ Since the fear of reversal often prevents an examiner from making an exclusionary ruling in the midst of a hearing,⁵⁸⁰ the compulsion to list reasons for a prehearing or midhearing ruling would seem to substantially lessen the possibility of Board or judicial reversal.

⁵⁷⁸ See 14 C.F.R. § 302.23 (1971); QUESTIONNAIRE, *supra* note 551, at 28, 31. See also W. JONES, *supra* note 479, at 45, 140-41.

⁵⁷⁹ See Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964).

⁵⁸⁰ See PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 53-54 (1955).

Rather than allowing a hobbling influx of public interest litigants at every stage of every proceeding, a case-by-case method of giving the public a forum while preserving the independence and flexibility of the administrative process may thus be developed.

Increased public participation before the CAB and other federal agencies demands recognition of an agency's "basic right to limit the scope of its inquiries"⁵⁸¹ through the judicious employment of efficient procedure. As "[a]dequate protection for interests obliquely affected may often be afforded through limited participation,"⁵⁸² the embryo of a reasonable, flexible intervention scheme may be found in the present CAB rules. With the modification suggested above, those rules, when generously applied, are capable of accommodating all interests and may well prove the prototype of fair public participation for all federal regulatory agencies.

C. Federal Trade Commission

Perhaps the most difficult conceptual and practical problems with public interest intervention arise in the context of the Federal Trade Commission. While the other agencies considered serve the primary function of allocating resources and privileges, the primary role of the FTC, as it is presently constituted,⁵⁸³ is to prosecute parties who violate federal statutes,⁵⁸⁴ particularly those who engage in unfair trade prac-

⁵⁸¹ *Frontier Airlines, Inc. v. CAB*, 349 F.2d 587, 591 (10th Cir. 1965).

⁵⁸² 3 K. DAVIS, *supra* note 23, § 22.08, at 241. See Shapiro, *supra* note 37, at 752-56.

⁵⁸³ Former FTC Commissioner Elman has recently suggested that "Congress should transfer the FTC's adjudicative function either to the district courts or, preferably, to a new Trade Court, which would be decentralized and hold hearings in every state, thus bringing the judicial phase of the regulatory process much closer to the people. The Trade Court could be given jurisdiction not only of complaints prosecuted by the agency, but also private class action suits brought by consumers and competitors injured by the same alleged unfair trade practices." The FTC's remaining functions would be "vested in a single commissioner serving at the pleasure of both the President and Congress and removable by either," in order to increase the FTC's accountability and therefore its responsiveness to the public and to enable it to pursue "a single central objective: the development and enforcement of regulatory policies carrying out the statutory mandate" through special investigations and expanded use of trade regulation rules and similar policy statements. Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A.J. 1045, 1048-49 (1970); cf. ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, REPORT 90 (1969) [hereinafter cited as ABA REPORT] (concurring statement of John D. French suggesting the transfer of prosecutorial functions to the Department of Justice, leaving the FTC to function as "a trade regulation court, commentator, and rulemaker"); PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 87 (1971) (the "Ash Council Report," recommending abolition of the FTC and transfer of its antitrust and consumer protection functions to separate new agencies); REPORT OF ABA SECTION OF ANTITRUST LAW TO STUDY THE ASH COUNCIL REPORT (1971) (rejecting the report and recommending instead the transfer of adjudicative functions to a new administrative court).

⁵⁸⁴ For a survey of the FTC's statutory authority and responsibilities, see ABA REPORT, *supra* note 583, at 6-7.

tices⁵⁸⁵ or conspire to lessen competition.⁵⁸⁶ The Commission employs a range of enforcement techniques varying with the seriousness of the offense, the need for prompt compliance with the law, the probability of winning the case if the Commission were put to its proof in a formal adjudicatory proceeding, and competing demands placed upon its resources. The Commission may seek an assurance of voluntary compliance or of informal corrective action, or it may negotiate a consent order with a party suspected of violating the law. If such negotiations fail, or if the Commission feels the issues cannot be satisfactorily resolved through such negotiation, it may initiate formal adjudicative proceedings against such a party.

1. Informal Proceedings

Informal proceedings, which dispose of the bulk of the Commission's cases,⁵⁸⁷ can commence in several ways. The Commission may negotiate directly with the party suspected of violating the law to effect an informal corrective action, which may consist of nothing more than an oral promise or exchange of letters, or it may secure an assurance of voluntary compliance.⁵⁸⁸ In such cases the proceeding never goes beyond the stage of informal discussions. In informal corrective actions, the assurances of voluntary compliance are not reported by the Commission; they remain confidential, putatively to protect the reputation of the complying party. The legal effect of such assurance is unclear for, unlike a consent order,⁵⁸⁹ it does not contain an admission of jurisdictional facts and waivers of procedural steps, of the requirement that the Commission state its findings of fact and conclusions of law, and of rights of judicial review and other challenges to its validity. Presumably, if the assurance is violated, the Commission's recourse is to seek a consent order or to institute a formal proceeding.

Under the consent order procedure, the Commission may notify a party of "its intention to institute a formal proceeding"⁵⁹⁰ against that party. The proposed respondent may then "file . . . a reply stating whether or not he is interested in having the proceeding disposed of by

⁵⁸⁵ See 15 U.S.C. § 45 (1970).

⁵⁸⁶ The FTC and the Department of Justice have concurrent jurisdiction to enforce §§ 2, 3, 7 & 8 of the Clayton Act, 15 U.S.C. §§ 13, 14, 18-19 (1970). See 15 U.S.C. § 21 (1970).

⁵⁸⁷ Approximately 90% of FTC cases are disposed of by consent orders. Telephone interview with Joachim Vollhard, Office of FTC Commissioner MacIntyre, Aug. 1971. This estimate does not take into account assurances of voluntary compliance or informal corrective actions. Cf. ABA REPORT, *supra* note 583, at 16-26. The ABA Report detected a trend toward greater reliance on informal proceedings, and concluded that "the de-emphasis of formal enforcement has gone too far." *Id.* 25. Undoubtedly, however, "the Commission would not be able to function without a system of consent settlement." Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 424 (1964).

⁵⁸⁸ See 16 C.F.R. § 2.21 (1971). For a statistical analysis of recent assurances, see ABA REPORT, *supra* note 583, at 22-23.

⁵⁸⁹ 16 C.F.R. § 2.33 (1971).

⁵⁹⁰ *Id.* § 2.31.

the entry of a consent order."⁵⁹¹ The proceeding is not adversary; it is a bargaining session conducted in confidence by parties both of whom have an interest in avoiding formal adjudication.⁵⁹² The proposed respondent does not admit to a violation of law (thus preventing private suitors from using the order as evidence in a damage suit) but merely agrees to comply with Commission requirements. As the Supreme Court has recently noted of consent orders obtained by the Department of Justice:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. . . .

[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.⁵⁹³

What of those who are not party to a consent order but whose interests are affected by it? If agreement is reached, the Commission will provisionally accept it and

will place the order contained therein on the public record for a period of thirty (30) days, during which it will receive and consider any comments or views concerning the order that may be filed by any interested persons. Within ten (10) days thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances require), and decision, in disposition of the proceeding.⁵⁹⁴

⁵⁹¹ *Id.* § 2.32.

⁵⁹² One former official of the Department of Justice has expressed concern that the Government's interests in avoiding litigation—the efficient allocation of enforcement resources and the immediate procurement of relief as contrasted with obtaining compliance only after protracted litigation—might be jeopardized by allowing intervention as of right by private parties in consent decree proceedings. "Where the Government has concluded that the added amount of relief which might theoretically be obtained would involve protracted litigation and use of enforcement resources which could be put to better use elsewhere, the private intervenor would rarely if ever be in a position to second-guess that judgment." Letter from Donald F. Turner to Representative Emanuel Celler, Mar. 17, 1967, in *BNA ANTITRUST & TRADE REG. REP.*, Mar. 21, 1967, at X-1, X-2 to -3.

⁵⁹³ *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

⁵⁹⁴ 16 C.F.R. § 2.34(b) (1971). This provision for public comment took effect on July 1, 1967, 4 years after the Department of Justice had adopted a similar policy.

Comments may be received from a variety of sources. Because the proposed orders are published in the Federal Register, however, only well-organized interests are likely to be fully informed of their significance and have the resources to present cogent commentary in the limited time available.⁵⁹⁵ Other concerned parties must generally rely on the limited coverage given FTC activities by the press, which alternative the Commission has made little effort to improve.⁵⁹⁶ There is, of course, no assurance that any comments received will have any effect; in fact, there have been very few cases in which a proposed consent order has been withdrawn or modified because of public comment.⁵⁹⁷ This is in no way surprising. By the time the Commission issues a provisional consent order, it has, for all practical purposes, made up its mind.

That current informal enforcement procedures insufficiently allow significant participation by third parties is being urged by a group of George Washington University law students incorporated as Students Opposing Unfair Practices, Inc. (SOUP), in their appeal of the Commission's acceptance of a consent agreement with the Campbell Soup Company.⁵⁹⁸ Campbell had been charged with placing marbles in a

The FTC had previously opposed such disclosure. See Auerbach, *supra* note 587, at 445-49. Cf. 16 C.F.R. § 1.4 (1971) (public comment on limited class of FTC advisory opinions).

⁵⁹⁵ See notes 253-55 *supra* & accompanying text.

⁵⁹⁶ See RESPONSES, *supra* note 30, at 195 (statement of FTC Comm'r Mary Gardiner Jones); cf. *id.* 116 (statement of former Comm'r Paul R. Dixon).

⁵⁹⁷ See Chrysler Corp., 4 CCH CONSUMER CREDIT GUIDE ¶99,596 (FTC 1971); Hemphill Enterprises, Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶18,524 (FTC 1969). Eric Schnapper, of the NAACP Legal Defense and Education Fund, Inc., New York City, had submitted comments suggesting stricter disclosure requirements in the Chrysler consent order. Although the staff initially disapproved Schnapper's recommendations, the commissioners subsequently accepted them. Telephone interview with Chris White, Office of FTC Commissioner Mary Gardiner Jones, Aug. 1971. Of the Fund's efforts in general before the FTC, Mr. Schnapper has noted:

Over the past two years, I would estimate, the Legal Defense Fund . . . has sought modifications of perhaps half a dozen orders, sought half a dozen trade regulations and filed half a dozen complaints against specific merchants. I have not fully resolved in my own mind whether this is worth continuing. Where it felt it had jurisdiction, the FTC has agreed to investigate the complaints but I have yet to see the results. None of the requested regulations has been promulgated. They aren't so much killed as just missing in action. Requests for modifications of [consent] orders have been rejected for a variety of reasons.

Letter from Eric Schnapper to the *University of Pennsylvania Law Review*, Sept. 13, 1971, on file in Biddle Law Library, Univ. of Pa. Law School. Cf. Letter from Joachim Volhard, Office of FTC Commissioner MacIntyre, to the *University of Pennsylvania Law Review* (undated), on file in Biddle Law Library, Univ. of Pa. Law School: "Very rarely is a consent order which has been provisionally accepted by the Commission re-executed upon receipt of comments."

⁵⁹⁸ SOUP, Inc. v. FTC, No. 24,476 (D.C. Cir., filed July 24, 1970). For a discussion of the availability of judicial review for parties other than respondents, see notes 698-706 *infra* & accompanying text.

bowl of its soup depicted in advertisements to create the illusion that the soup contained more solid ingredients than it actually did.⁶⁰⁰ The Commission had negotiated and provisionally accepted a consent order prohibiting Campbell from further engaging in such practices.⁶⁰⁰ During the thirty-day period when the order was of public record, SOUP filed motions⁶⁰¹ for disclosure, for an extension of time in which to comment, for leave to file one copy of documents rather than the twenty required by the rules,⁶⁰² for withdrawal of the provisional acceptance, and for intervention, none of which is contemplated by the rules for informal enforcement procedures.

The Commission, however, granted the extension, permitted filing of one copy of SOUP's documents, and provided for oral argument on the issues of the need for an evidentiary hearing to determine the appropriateness of the remedy SOUP urged and of SOUP's right to intervene in such a hearing.⁶⁰³ After oral argument, the Commission granted SOUP discovery of some of the documents it had requested and permitted it to submit further written statements.⁶⁰⁴ In the end, the Commission accepted the agreement as negotiated, denied the request for an evidentiary hearing, and granted SOUP a free copy of the transcript.⁶⁰⁵ SOUP had urged throughout that only the additional remedy of affirmative disclosure of prior deceptive advertising—forcing the respondent to wear a "scarlet letter"—would dissipate residual deception resulting from Campbell's misrepresentation.⁶⁰⁶ Petitioning for review of the order, SOUP argued that, although it had been allowed to raise the question whether the corrective remedy it proposed was necessary to protect the public, the Commission erred in not holding an evidentiary hearing, or, in the alternative, in not withdrawing the order

⁵⁹⁹ Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,261, at 21,422 (FTC 1970).

⁶⁰⁰ *Id.* at 21,421.

⁶⁰¹ *Id.* at 21,422.

⁶⁰² 16 C.F.R. § 42(c) (1971).

⁶⁰³ Brief for Petitioner at 14, SOUP, Inc. v. FTC, No. 24,476 (D.C. Cir., filed July 24, 1970). Commissioner Elman pointed out strikingly the conceptual difficulties such concessions presented under the current rules:

If the Commission should approve the consent order [in the *Campbell* case] which is now under consideration we would simultaneously issue that order with the issuance of a formal complaint. . . . That is the procedure. The proposed complaint would become a formal complaint, and at the precise moment that it was issued, the Commission would also be issuing a final order. So that if you have any standing to intervene, it would be in that flicker of a second between the issuance of the complaint and the issuance of a cease and desist order.

Transcript of hearing on motion by SOUP to intervene, File 69-2-3061, Feb. 5, 1970, at 11.

⁶⁰⁴ Brief for Petitioner at 14, SOUP, Inc. v. FTC, No. 24,476 (D.C. Cir., filed July 24, 1970). See Letter from Joseph W. Shea, Secretary, FTC, to Aaron Handleman, member, SOUP, Inc., Feb. 24, 1970, copy on file in Biddle Law Library, Univ. of Pa. Law School.

⁶⁰⁵ Brief for Petitioner at 14, SOUP, Inc. v. FTC, No. 24,476 (D.C. Cir., filed July 24, 1970).

⁶⁰⁶ See note 669 *infra*.

and initiating formal adjudicative proceedings.⁶⁰⁷ Dissenting from the Commission's disposition of the case, Commissioner Elman noted:

Issues of such large importance to the public should not be "settled" on the basis of respondents' acceptance of a consent order whose adequacy has been seriously challenged by responsible representatives of the public interest.⁶⁰⁸

That the issue raised by SOUP was indeed of large public importance is suggested by the Commission's subsequent experiments with the affirmative disclosure remedy.⁶⁰⁹ An agency necessarily has broad discretion in choosing the type and scope of remedial orders, but that choice is reviewable for an abuse of discretion or for the failure to consider relevant policy issues.⁶¹⁰ The question raised in the petition for review is the degree of control third parties should have over informal proceedings once such issues arise. The Commission's apparently unprecedented grant of privileges to SOUP was certainly adequate to bring the issue into sharp relief, but should groups like SOUP be allowed extensive privileges whenever such issues are present in consent order negotiations, and should SOUP in *Campbell* have been allowed to do more? SOUP did not purport to challenge the Commission's discretion to determine ultimately the adequacy of the order to protect the public interest; rather, it argued that the Commission had not built a sufficient factual basis upon which to exercise an informed discretion⁶¹¹ and that only an evidentiary hearing or formal adjudicative proceeding would supply that basis. Its attack went primarily to the adequacy of the procedure by which the order was accepted, not the substance of the order itself, thus avoiding the question who may seek review of such an order.⁶¹² Subtle though that argument be, the obvious result would be to set aside or at the very least delay the effectiveness of the negotiated order. SOUP's petition for review of the *Campbell* order raises the question whether that order is currently enforceable; ordinarily, only a final order is enforceable, and an order does not become "final" if a timely petition for review is filed.⁶¹³ The answer may depend upon whether third parties may seek review at all of enforcement orders, either in the informal or adjudicative context. Unless the

⁶⁰⁷ Brief for Petitioner at 19-20, *SOUP, Inc. v. FTC*, No. 24,476 (D.C. Cir., filed July 24, 1970).

⁶⁰⁸ *Campbell Soup Co.*, [1967-1970 Transfer Binder] *TRADE REG. REP.* ¶ 19,261, at 21,425 (FTC 1970).

⁶⁰⁹ See note 668 *infra* & accompanying text. Cf. *RESPONSES*, *supra* note 30, at 133-34 (statement of Comm'r Philip Elman).

⁶¹⁰ See *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946). Cf. *Magnaflco Co. v. FTC*, 343 F.2d 318 (D.C. Cir. 1965).

⁶¹¹ Brief for Petitioner at 19-20, *SOUP, Inc. v. FTC*, No. 24,476 (D.C. Cir., filed July 24, 1970).

⁶¹² See notes 698-706 *infra* & accompanying text.

⁶¹³ 15 U.S.C. § 45(g) (1970).

Commission's prosecutorial discretion—its control over the allocation of prosecutorial resources throughout the enforcement program—is to be curtailed to the extent of requiring an evidentiary hearing or formal adjudication whenever such issues arise and of permitting judicial review of the outcome, it must be left to the Commission to decide whether additional or alternative proceedings are desirable.

Participation in the consent order procedure, even to the extent allowed SOUP in the *Campbell* case, might significantly reduce one important incentive for prospective respondents to participate in that procedure—the confidentiality and protection from injurious publicity. The prospect of extensive public discussion of the adequacy of the provisionally accepted order may be just as distasteful to a prospective respondent as the prospect of trial publicity, and he may therefore be less hesitant to put the Commission to the delay and expense of proving its case. A partial solution to the problem of maintaining confidentiality while encouraging public comment might incorporate the following procedure: the Commission might make public a statement of its intention to issue a complaint regarding a specified practice without identifying the prospective respondent, or, in the alternative, issue the actual complaint. Bargaining over the order could still proceed in confidence, while third parties could make general comments on the complaint, proffer special expertise, and propose remedies appropriate to the specified practice, prior to the issuance of the provisional order.⁶¹⁴ Information obtained in this manner would be made available to the bargaining parties during negotiations and would be more likely to influence the formulation of the order. After the prospective respondent has made its final offer of an order, the Commission might hold confidential hearings similar to those utilized in its investigative proceedings⁶¹⁵ to permit third parties to present evidence and argument regarding the adequacy of the order. Third parties participating in such hearings would, of course, have to respect their confidentiality.

These methods of supplementing the existing provision for public comment on provisional orders would still not provide the discovery and evidentiary hearing requested by SOUP in *Campbell*. Presumably, much of the information SOUP desired would have been found in the Commission's investigatory file on the prospective respondent and therefore would have fallen within the exemption of the Freedom of Information Act for "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."⁶¹⁶ The classification may not be used indiscriminately to

⁶¹⁴ "[P]re-order citizen participation would be more meaningful in the shaping of an order. As far as I can see, there would be no compelling reason why such a procedure could not be instituted." Letter from Joachim Vollhard, Office of FTC Commissioner MacIntyre, to the *University of Pennsylvania Law Review* (undated), on file in Biddle Law Library, Univ. of Pa. Law School.

⁶¹⁵ See 16 C.F.R. § 2.8 (1971).

⁶¹⁶ 5 U.S.C. § 552(h)(7) (1970). See generally Davis, *The Information Act. A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 799-800 (1967).

conceal information, but an adjudicative proceeding need not be "imminent" for the exemption to become operative.⁶¹⁷ While it is debatable whether the threat of an adjudicative proceeding is "imminent" after the issuance of a provisional consent order, "the prospect of enforcement proceedings" might be "concrete enough to bring into operation the exemption for investigatory files."⁶¹⁸ Indeed, that prospect would be heightened by allowing greater participation by third parties in the negotiation and acceptance of consent orders. In general, the FTC has not liberally permitted discovery.⁶¹⁹ Such discovery may be vitally needed by a third party who wishes to challenge the adequacy of a consent order (or, for that matter, a cease and desist order resulting from an adjudicative proceeding) on other than broad policy grounds. Even if the third party claims expertise or a novel legal theory as a ground for intervention, he may yet require data available only from the files of the Commission or the proposed respondent to support his arguments. The Commission's rules for investigations⁶²⁰ and for adjudicative proceedings⁶²¹ provide adequate protection against abuse of discovery and could easily be adapted to consent order proceedings. Although the Commission's grant of discovery in *Campbell* was characterized by one of SOUP's advocates as niggardly,⁶²² it apparently presented no conceptual difficulties despite the absence of a rule providing for discovery in that context. There would seem no reason, apart from the concern for maintaining confidentiality and avoiding adjudication, to deny discovery limited to the grounds on which a provisional consent order is challenged.

SOUP's request for an evidentiary hearing does, however, create conceptual difficulties. Certainly there is no provision for such a hearing in the current rules. Presumably, the particularity of inquiry of such a hearing would approach that of an adjudicative proceeding. While the confidential pre-order hearing on the complaint and the range of possible remedies suggested above would focus on broad policy issues, an evidentiary hearing would arguably focus upon the conduct of the individual respondent. To the extent that this is true, the proposed respondent would likely demand the full procedural rights of a party to an adjudicative proceeding. The prospect that such an evidentiary

⁶¹⁷ *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970).

⁶¹⁸ *Id.* at 939; see Project, *supra* note 495, at 180-81.

⁶¹⁹ See Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1969); Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113 (1968); cf. Lewis, *Discovery Techniques and the Protection of Confidential Data in FTC Proceedings*, 21 AM. L. REV. 457, 460-64 (1969). See generally Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89.

⁶²⁰ 16 C.F.R. §§ 2.7-12 (1971).

⁶²¹ *Id.* §§ 3.32-37.

⁶²² Interview with Geoffrey Cowan, Center for Law and Social Policy, in Washington, D.C., Sept. 27, 1971.

hearing might be held after the prospective respondent had made its final offer of a consent order, but before the Commission had accepted it, might lead the respondent to forego informal negotiations in favor of adjudication.

The privileges granted SOUP in the *Campbell* case might be viewed as the logical concomitants of the privilege to comment upon provisional consent orders. The suggestions above for expanding that privilege to include pre-order comment and a confidential hearing are intended to provide the Commission with more information on broad issues of policy without encroaching upon its prosecutorial discretion. To allow third parties or an independent agency⁶²³ to challenge consent orders by initiating an evidentiary hearing or an adjudicative proceeding, however, might effectively curtail that discretion and make the Commission's allocation of enforcement resources even less efficient.⁶²⁴

A similar problem arises in the enforcement of the Clayton Act by the Department of Justice. Formal intervention by third parties to challenge consent decrees in those antitrust enforcement proceedings had been fairly consistently denied.⁶²⁵ The one important case which reached a contrary result was *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*⁶²⁶ In an earlier related case, the Supreme Court found that an acquisition by El Paso violated section 7 of the Clayton Act and ordered divestiture.⁶²⁷ When the relief subsequently framed by the Department of Justice and El Paso did not include the divestiture contemplated by the Court, a major consumer, a competitor, and the State of California all sought intervention in the proceeding. The Court held intervention should have been granted as of right. Subsequent cases have tended to limit the holding of *El Paso* to its facts.⁶²⁸ In

⁶²³ See notes 319-20 *supra* & accompanying text.

⁶²⁴ Cf. ABA REPORT, *supra* note 583, at 27-28:

[I]n terms of a percentage of its total budget, the FTC was spending in 1968 and 1969 about one-half as much on merger enforcement as it had been spending in 1959. This reduction took place during a period when the United States . . . was undergoing the greatest surge of merger activity in its history.

Similarly . . . the FTC has not seen fit to divert resources from other uses in order to carry out effective monitoring [of mass media advertising] or compliance [by firms that had previously entered into assurances of voluntary compliance or informal corrective procedures].

See generally Elman, *supra* note 29.

⁶²⁵ See Shapiro, *supra* note 37, at 743-44 (1968); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 403-07 (1967).

⁶²⁶ 386 U.S. 129 (1967); cf. *United States v. First Nat'l Bank & Trust Co.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967), *aff'd mem. sub nom. Central Bank & Trust Co. v. United States*, 391 U.S. 469 (1968) (antitrust case granting intervention to a stockholder and a competitor after Government failed to appeal; district judge found "about a ninety per cent capitulation" by the Government in its role as defender of the public interest).

⁶²⁷ *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

⁶²⁸ See, e.g., *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd mem. sub nom. City of New York v. United States*, 397 U.S. 243

United States v. CIBA Corp.,⁶²⁹ Judge Frankel, reviewing these cases, noted that "the fact that a mandate of the Supreme Court had been disregarded was a matter of consequence in [*El Paso*],"⁶³⁰ and suggested the following test for intervention: "the interest justifying intervention as of right in an antitrust suit brought by the United States must be substantial, must lie at the center of the controversy, and must be shown clearly, in the language of the Rule, to be less than 'adequately represented' by the Department of Justice."⁶³¹

Of course, *El Paso* involved a proceeding to frame relief and was decided under the Federal Rules of Civil Procedure and not section 11(b) of the Clayton Act⁶³² or section 5(b) of the Federal Trade Commission Act,⁶³³ which govern formal FTC adjudicative proceedings. Furthermore, the FTC employs consent orders in many enforcement proceedings unrelated to the Clayton Act.⁶³⁴ Despite these distinctions, the underlying problem remains: what of cases where an FTC consent order fails to implement, not a previous holding of the Supreme Court, but the clear mandate of a statute or Commission rule, and where the interests affected are not those of major utilities, corporate consumers, and competitors, but those of individual consumers? Perhaps the short answer is that, if *El Paso* is not an aberration, the present concern for conserving enforcement resources through use of informal proceedings should give way to a recognition that more resources should be provided, so that formal adjudication of matters affecting the interests of large segments of the public or matters involving broad issues of policy may be obtained.⁶³⁵

A recent comment⁶³⁶ has explored the role of nonparty participation in antitrust proceedings brought by the Department of Justice to frame consent decrees. The comment concludes that nonparties "are

(1970) (intervention denied where main goal was to compel litigation of the case to judgment, which then might be used as a basis for intervenors' private treble damage actions); *United States v. Western Elec. Co.*, 5 TRADE REG. REP. (1968 Trade Cas.) ¶ 72,415 (D.N.J. 1968), *aff'd mem. sub nom.* Clark Walter & Sons, Inc. v. *United States*, 392 U.S. 659 (1968) (motion to intervene filed 12 years after entry of consent decree denied); *United States v. Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Cal. 1967), *aff'd mem. sub nom.* Thrifty Shoppers Scrip Co. v. *United States*, 389 U.S. 580 (1968) (motions to intervene denied as untimely); *United States v. Aluminum Co. of America*, 41 F.R.D. 342 (E.D. Mo. 1967), *appeal dismissed mem. sub nom.* Lupton Mfg. Co. v. *United States*, 388 U.S. 457 (1967) (motion to intervene filed over 2 years after final order of divestiture denied).

⁶²⁹ 50 F.R.D. 507 (S.D.N.Y. 1970).

⁶³⁰ *Id.* at 512.

⁶³¹ *Id.* at 513.

⁶³² 15 U.S.C. § 21(b) (1970); see notes 682-90 *infra* & accompanying text.

⁶³³ 15 U.S.C. § 45(b) (1970).

⁶³⁴ Cf. notes 584-88 *supra* & accompanying text.

⁶³⁵ Cf. note 624 *supra*; E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION 57-71 (1969). See also RESPONSES, *supra* note 30, at 1.2, 129, 135-36 (Statement of Comm'r Phillip Elman criticizing the secrecy of consensual agreements).

⁶³⁶ Comment, *Private Participation in Department of Justice Antitrust Proceedings*, 39 U. CHI. L. REV. 143 (1971).

able to direct successful challenges to substantive shortcomings of these decrees and, in effect, to take appeals from adverse rulings—all while remaining technically outside of the litigation.”⁶³⁷ It notes that non-parties participated often in the role of amicus and that therefore granting formal intervention would not contribute to delay or prejudice to the original parties, and would not generate additional litigation.⁶³⁸ It analyzes a number of procedural devices the courts have devised to accommodate the special nature of the judicial proceedings with such participation that are not directly relevant to the procedures the FTC employs, but which do demonstrate the ingenuity that can be brought to bear “to produce a thorough examination of the issues without impairing the utility of the consent decree for the parties.”⁶³⁹ The comment approves of such devices, but proposes as an alternative the following scheme for formal intervention:

Leave to intervene would be granted at the discretion of the court and would be limited to as narrow a substantive compass as possible. Procedural rights would be afforded as required for a full examination of the underlying controversy, including if necessary the right to discovery and compulsory process, subject in turn to the litigants’ alternative right to withdraw their consent from the settlement. The power to block entry of a consent decree or other settlement agreeable to the original parties and the court would be withheld, but the right to appeal from such a judgment would be retained.⁶⁴⁰

The FTC in the *Campbell* case indicated little willingness to experiment with informal participation in its consent order program. While the procedural mechanisms the federal judiciary has developed are not directly apposite, the underlying attitude toward the potential contribution of nonparties clearly is, especially in light of the fact that public interest groups have not yet been among the nonparties participating. How public interest representation may be procedurally implemented in the context of FTC consent orders is one question awaiting resolution in the pending *Campbell* appeal.

2. Formal Adjudicative Proceedings

Formal adjudicative proceedings are essentially adversary in nature and may lead to the imposition of substantial penalties.⁶⁴¹ To the extent that the two-party contest sharpens presentation of the issues

⁶³⁷ *Id.* 169.

⁶³⁸ *Id.* 153.

⁶³⁹ *Id.* 160.

⁶⁴⁰ *Id.* 176.

⁶⁴¹ See ABA REPORT, *supra* note 583, at 8 & n.20. These civil penalties may be imposed by a court for violation of a final FTC order.

and thereby makes decision easier, and that intervention by third parties delays enforcement and unfairly subjects the respondent to different and perhaps conflicting lines of attack, such intervention should be limited. Formal adjudicative proceedings, however, serve also as vehicles for the formulation of Commission policy.⁶⁴² Although there have been indications of increased reliance on trade regulation rules,⁶⁴³ redefinitions of unlawful conduct and appropriate remedies are most likely to be made in the adjudicatory context. To the extent that broad questions of policy are decided in that context, intervention by parties affected by these policies should be allowed and encouraged.

The Federal Trade Commission Act makes the following provision for intervention:

Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person.⁶⁴⁴

The Commission's procedural rules themselves provide no more explicit standard for "good cause shown":

The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.⁶⁴⁵

Motions to intervene in adjudicative proceedings have been viewed with disfavor by the Commission. Potential intervenors have sought, but have been denied, intervention on a number of grounds: the existence of a similar case on the docket involving the potential intervenor

⁶⁴² See Robinson, *supra* note 191, at 490-96.

⁶⁴³ See 16 C.F.R. § 1.12 (1971); cf. K. DAVIS, *DISCRETIONARY JUSTICE* 74-77 (1969) (FTC "Cigarette Rule" on hazards of smoking); Shapiro, *supra* note 198, at 964-67 ("Cigarette Rule").

Problems associated with intervention might conceivably arise in the context of a trade regulation rule hearing. The FTC usually commences such hearings on a complaint, although it may act *sua sponte*. Any interested person may give oral evidence; only the Commission staff, however, may cross-examine. Because one purpose of such hearings is to build a record that can withstand possible judicial scrutiny, interested persons might argue for cross-examination privileges to augment their impact on the record. Telephone interview with FTC Commissioner Mary Gardiner Jones, Aug. 1971. The hearings themselves, of course, are not required by § 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c) (1970). For proposals to make the FTC's rulemaking authority more explicit, see SENATE COMM. ON COMMERCE, CONSUMER PROTECTION ACT: REPORT ON S. 3201, S. REP. NO. 91-1124, 91st Cong., 2d Sess. 13, 22, 51 (1970). As Chairman Weinberger noted, "the Commission believes that its power to issue substantive rules should be made more explicit. Any doubts about its rulemaking authority should be clarified and removed. Any possible ambiguity in its present rulemaking authority between its Labeling Acts and the Federal Trade Commission Act should be eliminated." *Id.* 51.

This development may well have been halted, at least within the existing statutory context, by the recent and surprising holding that the FTC has no statutory authority at all to issue trade regulation rules. See *National Petroleum Refiners Ass'n v. FTC*, 40 U.S.L.W. 2671 (D.D.C. Apr. 4, 1972).

⁶⁴⁴ 15 U.S.C. § 45(b) (1970). See 15 U.S.C. § 21(b) (1970).

⁶⁴⁵ 16 C.F.R. § 3.14 (1971).

as respondent;⁶⁴⁶ involvement of the potential intervenor in a similar proceeding currently pending;⁶⁴⁷ the suffering of injury from unfair competition;⁶⁴⁸ and the fact that the potential intervenor proposed to advance legal theories not raised by the Commission's complaint counsel or the respondent.⁶⁴⁹ It has long been clear that private injury per se confers standing neither to initiate nor to intervene in an adjudicative proceeding.⁶⁵⁰ Underlying the reluctance to grant intervention is the theory that the Commission

acts only in the public interest, any protection afforded private persons being only incidental, and it must be ever vigilant against the possibility of its processes being used to further the private interests of any party.⁶⁵¹

Because the Commission itself acts as prosecutor, the need for allowing "private attorneys general"⁶⁵² to initiate actions would seem to be substantially diminished, although not obviated altogether. The need to prevent the Commission from becoming a forum for private damage suits by competitors, which seems the policy behind the restrictive provisions for judicial review,⁶⁵³ should not lead to the exclusion at the Commission level of groups asserting "private" interests held by large segments of the public. The legislative history may disclose an intent to foreclose judicial review to certain classes of parties, but that does not necessarily imply the intent to foreclose participation in the proceedings themselves. If it did, why was any provision at all made for intervention? Even if the *Data Processing-Welfare Rights* rationale⁶⁵⁴

⁶⁴⁶ Max Factor, Inc., No. 7717, Order Denying Motion to Intervene (FTC, May 11, 1970).

⁶⁴⁷ Berger Watch Co., 56 F.T.C. 1655 (1969) (application denied as "untimely").

⁶⁴⁸ Grand Caillou Packing Co., No. 7887, Order Denying Motion to Intervene (FTC, Nov. 8, 1962).

⁶⁴⁹ Kennecott Copper Corp., 3 TRADE REG. REP. ¶ 19,281 (FTC 1970); see notes 682-90 *infra* & accompanying text.

⁶⁵⁰ FTC v. Klesner, 280 U.S. 19, 25-26 (1929). See notes 682-707 *infra* & accompanying text. On the other hand, states and other governmental units have occasionally been allowed limited intervention, often on behalf of respondents representing industries of economic importance to their particular regions. See, e.g., Florida Citrus Mut., 53 F.T.C. 973 (1957); Soap Lake Prods. Corp., 33 F.T.C. 999 (1941). Such intervention is possibly allowed merely as a matter of political accommodation, for trade associations seeking to advance similar arguments have been denied intervention. See, e.g., Campbell Taggart Associated Bakeries, Inc., 62 F.T.C. 1494 (1963); Florida Citrus Mut., *supra*.

⁶⁵¹ Wilson Tobacco Bd. of Trade, 52 F.T.C. 1148, 1151 (1956). Compare the role of a private person filing an unfair labor practice charge under the National Labor Relations Act, 29 U.S.C. § 160 (1970), and 29 C.F.R. §§ 102.9-.59 (1971). The NLRB recognizes the existence of private rights within the statutory scheme. Local 283, UAW v. Scofield, 382 U.S. 205, 218 (1965). If a complaint is issued on the basis of such a charge, the charging party may participate in the hearings as a "party." If the Board dismisses the complaint, he may obtain judicial review and may intervene in appellate review of an NLRB order initiated by the unsuccessful party. *Id.* at 219-21.

⁶⁵² See note 53 *supra* & accompanying text.

⁶⁵³ See notes 692-706 *infra* & accompanying text.

⁶⁵⁴ See notes 7-12, 57-70, 94-113 *supra* & accompanying text.

for requiring participation below to the extent necessary to make the right of review effective does not apply, a court might still require participation on the ground, for example, that some important policy position had not been adequately represented and that the determination was not therefore based upon substantial evidence.

This Comment previously outlined some reasons why agencies might not adequately represent each of the interests held by large segments of the public affected by its decisions.⁶⁵⁵ The adversary nature of FTC adjudicative proceedings heightens that problem: complaint counsel may well lack the time, resources, and tactical flexibility to assess fully the impact of challenged conduct on consumers, the economy, or the environment and to develop, accordingly, new theories of liability or appropriate remedies on a case-by-case basis.⁶⁵⁶ These are areas in which participation by third parties, including public interest groups, could contribute most. Informal methods of participation in adjudicative proceedings by third parties are not unusual. Trade associations apparently have close ties with the Commission and complaint counsel.⁶⁵⁷ Nothing prevents third parties from working informally with counsel for the FTC or respondent in the preparation of its case. This channel is open to a public interest group in those instances where it might wish to aid or oppose a respondent by furnishing suggestions, theories, or factual data.

The FTC has recently experimented with expanding the scope of formal participation in adjudicative proceedings. In *Firestone Tire & Rubber Co.*,⁶⁵⁸ SOUP was allowed to intervene in forma pauperis in an adjudicative proceeding charging Firestone with deceptive advertising regarding the pricing and safety of its tires. In granting SOUP's request to file an interlocutory appeal⁶⁵⁹ from the hearing examiner's denial of intervention, the Commission stressed that, by allowing limited intervention, it was "beginning a delicate experiment, one requiring caution and close observation" and that its action "should [not] be construed as a permanent or irreversible policy decision."⁶⁶⁰ The Commission directed the hearing examiner to permit intervention for the purposes of

(1) presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and non-cumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;

⁶⁵⁵ See notes 157-60 *supra* & accompanying text.

⁶⁵⁶ Cf. ABA REPORT, *supra* note 583, at 12-15, 78-80.

⁶⁵⁷ See, e.g., Whiting, *The Role of a Trade Association When the Government Looks to Its Industry*, 13 ANTITRUST BULL. 567, 586-87 (1968); cf. notes 683-87 *infra* & accompanying text.

⁶⁵⁸ 3 TRADE REG. REP. ¶19,373 (FTC 1970). See Project, *supra* note 495, at 228-38.

⁶⁵⁹ See note 260 *supra* & accompanying text.

⁶⁶⁰ 3 TRADE REG. REP. ¶19,373, at 21,502.

(2) presenting, with respect to said issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable; and

(3) exercising, with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary.⁶⁶¹

In the course of the subsequent hearing, SOUP was not allowed to address the issues of deceptive advertising and pricing; its intervention was limited to the appropriateness of the proposed remedy, although on that issue it was apparently allowed to cross-examine witnesses.⁶⁶² Soon after the Commission granted SOUP limited intervention, the examiner granted similar privileges to the Association of National Advertisers, Inc., (ANA) to address the same issue. SOUP argued, as it had in the *Campbell* case, that "affirmative disclosure" should be part of the remedy in order to counteract the residual effects of Firestone's advertising. The examiner concluded that affirmative disclosure was inappropriate,⁶⁶³ and an appeal is presently before the Commission.

Despite its failure to convince the examiner, SOUP did have a significant opportunity to supplement the record. In granting intervention the Commission suggested five criteria that should be considered in future cases: (1) the applicant's "desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued"; (2) the nature of the issues (that they be "of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding"); (3) the applicant's potential contribution to a just resolution of the issues; (4) the need for expedition in obtaining compliance with the law; and (5) "the possible prejudice to the original parties."⁶⁶⁴ At the same time, the Commission emphasized that no precise standard could be formulated but that, because "the FTC has a built-in public interest prosecutor in all of its proceedings," there must be a "substantial showing of special circumstances justifying intervention."⁶⁶⁵ The adversary nature of FTC proceedings and special

⁶⁶¹ *Id.*

⁶⁶² Interview with Geoffrey Cowan, Center for Law and Social Policy, in Washington, D.C., Sept. 27, 1971.

⁶⁶³ 3 TRADE REG. REP. ¶19,373.

⁶⁶⁴ *Id.* at 21,501-02 (emphasis in original).

⁶⁶⁵ *Id.* at 21,502. For a recent case in which intervention seems to have been granted in disregard of the tentative guidelines established in *Firestone*, see *American Gen. Ins. Co.*, 3 TRADE REG. REP. ¶19,915 (FTC, Feb. 11, 1972). In dissent, Commissioner Mary Gardiner Jones noted:

It is obvious that the factors enumerated in the Commission's *Firestone* opinion are not ones for determination by its hearing examiners and quite clearly do not simply involve housekeeping matters associated with the conduct of the hearings. The addition of a party is and always has been regarded as an issue on which only the Commission can finally rule. Moreover, so long as rulings on intervention embrace in some significant respect issues of resource allocation and delicate weighing of priorities and long range

problems concerning the reviewability of FTC decisions⁶⁶⁶ make the argument from *Data Processing* and *Welfare Rights*—that one within the zone of interests sought to be protected by the relevant statute has a right to participate in agency proceedings to the extent necessary to make the right of review effective⁶⁶⁷—of limited applicability.

In *Firestone* the Commission indicated interest in exploring "affirmative disclosure" in a case that involved a "public safety danger" because "this issue and this type of case is high on the list of our own priorities."⁶⁶⁸ Perhaps its willingness to allow intervention to SOUP, and the examiner's extension of similar privileges to ANA, reflected a realization that the issue, despite the adversary context in which it arose, would be more properly decided in the rulemaking context, and that wider participation by third parties should be permitted in recognition of that fact. On the other hand, perhaps the Commission sought to forestall industry opposition by allowing the issue to be raised in this more indirect manner. Whatever the Commission's motives in *Firestone*, the remedy originally urged by SOUP has subsequently been obtained in other cases by complaint counsel without participation by third parties.⁶⁶⁹ It remains to be seen whether future intervention will require the presence of and be limited to similar issues arguably more appropriate for rulemaking. Allowing intervention limited to such issues in the adjudicative context may be a compromise, however inadequate, between the Commission's desire to retain the flexibility in formulating policy and the control complaint counsel has over the issues that the adjudicative context affords, and its apparent recognition of the value of broadened participation. The Commission has not yet clarified the functions it thinks intervention should serve, nor has it provided more precise standards for its grant or denial.

Since intervention in *Firestone* was granted, the Commission has referred the problem of formulating more precise standards to an advisory committee on rules and practices⁶⁷⁰ which has not yet made its

benefits to the public interest, the Commission cannot duck responsibility for the ultimate decision by hiding behind its examiner's ruling as it has tried to do in the instant case.

Id. at 21,931.

⁶⁶⁶ See notes 692-699 *infra* & accompanying text.

⁶⁶⁷ See notes 7-12, 57-70, 94-113 *supra* & accompanying text.

⁶⁶⁸ 3 TRADE REG. REP. ¶ 19,373, at 21,502.

⁶⁶⁹ See Note, "Corrective Advertising" *Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477 (1971).

⁶⁷⁰ See Resolution authorizing an Advisory Council on FTC Rules of Practice and Procedure, 36 Fed. Reg. 4728 (1970); FTC News Release (May 27, 1970). The Commission invited public comment on the proposed revision, FTC News Release (July 15, 1970). In response, Bruce Terris, a Washington, D.C., attorney, submitted "without success" proposed revisions which would (1) provide intervention with full party status as of right in adjudicative proceedings to any person or competent representative of a class which meets the *Data Processing* test; (2) provide public disclosure of assurances of voluntary compliance, see notes 587-89 *supra* & accompanying text, and opportunity for public comment and for a hearing if a substantial question of fact as to the appropriateness or adequacy of the assurance is raised by

recommendations.⁶⁷¹ The proposed model intervention rules⁶⁷² and rule 24 of the Federal Rules of Civil Procedure, which grants intervention as of right to private parties whose interests may be affected by the proceeding and who are otherwise unrepresented,⁶⁷³ are overly broad and therefore unhelpful in formulating a standard that takes into account the prosecutorial role of complaint counsel and the jeopardy that attaches to respondents in FTC enforcement proceedings.

Even if the tautology that complaint counsel represents all affected interests because he acts in the "public interest" can be broken, there remain further objections to allowing intervention by parties whose interests are potentially affected but arguably unrepresented. Former Commissioner Elman and the ABA Commission to Study the Federal Trade Commission have strongly criticized the FTC for failure to establish priorities, consistent with its limited resources, among the many types of industry activity it has authority to regulate and the many statutory prohibitions it is charged to enforce.⁶⁷⁴ If third parties were given the power to override the Commission's discretion in choosing which cases to prosecute, or, when adjudication has commenced, to usurp complaint counsel's control over trial tactics, the Commission's attempts to establish and implement such priorities might be seriously impaired, to say nothing of the potential increase in delay, which even now is one of the Commission's major problems.⁶⁷⁵ On the other hand, once adjudication has commenced and substantial questions of policy or fact are raised, there would seem to be no policy reasons against the approach suggested in *Firestone*. Intervention before the hearing examiner limited to those questions should be allowed, with appropriate procedural privileges, including the presentation of witnesses, cross-examination, and discovery, necessary to address those questions adequately. Some questions of policy, where underlying facts are not in dispute, might be effectively addressed through the presentation of an amicus brief; where facts are in dispute, however, intervenors must be allowed procedural privileges sufficient to enable them to present their evidence bearing on those facts.

While it might be adequate for the presentation of general legal or policy arguments, intervention before the Commission without previous participation before the hearing examiner would not present the opportunity for the participant to contribute to the record evidence or

a party who would have the right to intervene in an adjudicative proceeding; and (3) provide a similar hearing when a substantial question as to the appropriateness or adequacy of a proposed consent order is raised. Letter with copy of proposed rules from Bruce J. Terris to *University of Pennsylvania Law Review*, Sept. 14, 1971, on file in Biddle Law Library, Univ. of Pa. Law School.

⁶⁷¹ Telephone interview with Theresa Schwartz, Office of FTC Commissioner Jones, Apr. 6, 1972.

⁶⁷² See note 18 *supra*.

⁶⁷³ FED. R. CIV. P. 24; cf. notes 114-20 *supra* & accompanying text.

⁶⁷⁴ See sources cited note 624 *supra*.

⁶⁷⁵ See, e.g., ABA REPORT, *supra* note 583, at 28-32.

expertise not otherwise available. Intervention before the Commission itself presents no great mechanical problems: at most, extra time would be expended for oral argument and consideration of additional briefs and other written submissions. This form of participation, though the easiest for the Commission to grant, may not permit the fullest possible contribution by the intervenor. Allowing intervention before the hearing examiner might, however, aggravate existing problems of delay and manageability if the privileges granted intervenors—and particularly the privilege of cross-examination—are not carefully tailored to the purposes of their participation.

Firestone leaves a number of troublesome questions unanswered. Assuming broad questions of policy or fact are raised in an adjudicative proceeding, what qualifies applicants for intervention to speak to those matters? The possession of unique expertise or access to facts not otherwise available to the Commission, such as that claimed by SOUP⁶⁷⁶ and the ANA⁶⁷⁷ in *Firestone*, might in itself qualify a party to intervene. Many groups whose interests may be vitally affected by a proceeding, however, may well lack expertise. The only organizations which currently could meet this requirement are trade organizations such as the ANA or broadly based public interest groups such as Consumers Union.⁶⁷⁸ Similarly, the desire to advance a legal theory which complaint counsel, for whatever reason, chooses not to utilize might be urged as a ground for intervention.⁶⁷⁹ The obvious dangers in allowing intervention on this ground are the potential unfairness to the respondent and the potential tactical restrictions on complaint counsel.

It has been suggested above that certain issues raised in the adjudicative context might more properly be treated in the rulemaking context. With respect to such issues, the objective should be to ensure representation of all interests affected by the decision, and intervention should therefore be granted more liberally. Should the sole criterion for intervention in such instances be whether the applicant's interest is

⁶⁷⁶ *Firestone Tire & Rubber Co.*, FTC No. 8818, Motion of SOUP, Inc., for leave to intervene, for leave to proceed in forma pauperis, and for disclosure, July 29, 1973, at 2.

⁶⁷⁷ *Firestone Tire & Rubber Co.*, FTC No. 8818, Motion of Association of National Advertisers, Inc., for leave to intervene, Nov. 24, 1970.

⁶⁷⁸ Consumers Union, a nonprofit organization chartered in 1936 under New York law, derives its income from the sale of its publications, the chief of which is *Consumer Reports*. Its purposes are "to provide consumers with information and counsel on consumer goods and services, to give information and assistance on all matters relating to the expenditure of family income, and to initiate and to cooperate with individual and group efforts seeking to create and maintain decent living standards." EDITORS OF CONSUMER REPORTS, *THE MEDICINE SHOW* 4 (1970). Consumers Union supported SOUP's motion to intervene in the *Campbell* case. Brief for Petitioner at 3, *SOUP, Inc. v. FTC*, No. 24,476 (D.C. Cir., filed July 24, 1970).

⁶⁷⁹ SOUP's legal theory in *Campbell* and *Firestone* was affirmative disclosure or "corrective advertising." See notes 668-69 *supra* & accompanying text. The United Steelworkers of America, in *Kennecott Copper Corp.*, 3 TRADE REG. REP. ¶19,619 (FTC 1971), appeal docketed, No. 71-1371, 10th Cir., Mar. 31, 1972, urged that the enhancement of the acquired coal company's position in the industry effected by the addition of the acquiring company's resources threatened to weaken competition in the industry. See note 689 *infra* & accompanying text.

adequately represented by existing parties? In some cases that standard would permit intervention by numerous parties who would appear to assert similar interests, but who, as a practical matter, would advance different policy positions formulated to advance those interests. Broadly based groups such as the NAACP or Consumers Union may not, because of their size and diversity of membership, reflect the interests of groups like the Black Panthers and SOUP. One criterion the Commission might use, therefore, is the "adequacy of representation" standard suggested by rule 24 of the Federal Rules of Civil Procedure.⁶⁸⁰ An applicant whose policy position relative to his interest is already adequately represented should be denied intervention. The Commission might require applicants to submit an explanation why they are not adequately represented or why their positions cannot be adequately represented simply by submitting an amicus brief and perhaps presenting oral argument. Where factual questions are intertwined with policy issues, as in the *Firestone* case, fuller procedural privilege will probably be required for adequate representation.

A related problem is the extent to which a broad policy issue appropriately addressed by otherwise unrepresented intervenors may be broadened still further. In *Firestone*, for example, should the issue of the appropriate remedy have been broadened if, independent of SOUP's contentions, another group had proposed restitution as a remedy, and still another had proposed that respondent never again be allowed to advertise the product in question? To what extent should priority in time of request for intervention or the degree to which the applicant group is established, well-organized, and well-funded be considered? Priority in application should be persuasive but not a controlling factor; otherwise, the Commission might deny participation to latecomers or poorly financed applicants in favor of better established groups like Consumers Union. To what extent could consolidation procedures such as those utilized in complex or multidistrict litigation be adapted to the agency proceeding to allow the maximum number of parties to enter with a minimum of confusion, while preserving the ability of each party to present the unique aspects of its position?⁶⁸¹

3. Appeals of Commission Orders

No party denied intervention in an adjudicative proceeding had sought judicial review of that denial, before the United Steelworkers of America did so in 1970.⁶⁸² The Steelworkers attempted to intervene in a proceeding against the Kennecott Copper Company for violating

⁶⁸⁰ See notes 115-20 *supra* & accompanying text.

⁶⁸¹ See generally Comment, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 MICH. L. REV. 303 (1969).

⁶⁸² *United Steelworkers v. FTC*, No. 24,629 (D.C. Cir., filed Sept. 15, 1970), petition for review withdrawn without prejudice (May 28, 1971). Such a development is undoubtedly related to the emergence of the *Data Processing-Welfare Rights* rationale. See notes 7-12, 57-70, 94-113 *supra* & accompanying text.

section 7 of the Clayton Act ⁶⁸³ by acquiring Peabody Coal Company.⁶⁸⁴ The union was influential in calling into question the legality of the acquisition,⁶⁸⁵ and appears to have had a fairly close working relationship with complaint counsel during the trial and before the hearing examiner issued his initial decision dismissing the complaint,⁶⁸⁶ although it did not participate in the trial in any formal capacity. After the examiner had issued his opinion, the Steelworkers filed a motion to intervene as a party before the Commission in support of the complaint. The union's grounds for intervention were that it represented the interests of its one and one-quarter million members as consumers of electricity which might be impaired by a lessening of competition in the coal industry, that it was a "responsible party to assert the interest of the public in preserving full and free competition," that acquisitions such as the one it opposed had an adverse effect on labor relations (though concededly an effect outside the jurisdiction of the FTC), and, most important, that if it were denied intervention and if Kennecott won before the Commission, complaint counsel would be bound by that decision and there would be no other party to seek judicial review.⁶⁸⁷ The Commission denied the Steelworkers party status but granted permission to file a brief and present oral argument on the merits.⁶⁸⁸ The Steelworkers urged a legal argument not pressed by complaint counsel, that the acquisition would in effect combine Kennecott's resources with Peabody's and thereby enhance Peabody's relative position in the coal industry to the detriment of competitors.⁶⁸⁹ Ultimately this argument contributed to the reversal of the initial decision: the Commission ordered divestiture,⁶⁹⁰ and the Steelworkers' petition for review of the denial of intervention was mooted.

⁶⁸³ 15 U.S.C. § 18 (1970).

⁶⁸⁴ Brief for Petitioner at 2, *United Steelworkers v. FTC*, No. 24,629 (D.C. Cir., filed Sept. 15, 1970).

⁶⁸⁵ FTC pre-merger clearance procedures were conducted in confidence, as are negotiations for informal corrective actions, assurances of voluntary compliance, and consent orders, and were strongly criticized by Professor Davis. K. DAVIS, *DISCRETIONARY JUSTICE* 113-16 (1969). In 1969, the FTC adopted a procedure whereby provisional approvals or disapprovals of mergers or similar transactions were made public and opportunity given for submission of objections or comments. *FTC News Release* (May 23, 1969), discussed in 3 *TRADE REG. REP.* ¶9738 (Packet No. 445, at 14-15, dated Dec. 22, 1969) (subsequently deleted). Without such a procedure, it would be very difficult for third parties who lack the investigative resources of groups like the Steelworkers to object effectively.

⁶⁸⁶ Telephone interview with Harold D. Rhynedance, Jr., Assistant General Counsel, FTC, Aug. 1971.

⁶⁸⁷ Brief for Petitioner at 4, *United Steelworkers v. FTC*, No. 24,629 (D.C. Cir., filed Sept. 15, 1970).

⁶⁸⁸ *Id.* 5.

⁶⁸⁹ Complaint counsel argued against the acquisition on the ground that it would eliminate Kennecott as a potential entrant into competition in the coal industry. *Id.* 5-6.

⁶⁹⁰ *Kennecott Copper Corp.*, 3 *TRADE REG. REP.* ¶19,619 (FTC 1971), *appeal docketed*, No. 71-1371, 10th Cir., Mar. 31, 1972. The political pressure generated by the Steelworkers arguably had as much influence on the result as the legal argument they advanced.

The question left undecided is, who may seek judicial review of the Commission's issuance of, or failure to issue, a cease and desist order, consent order, divestiture order, or other enforcement order. SOUP in *Firestone* and the Steelworkers in *Kennecott* had, in effect, all privileges necessary to advocate their positions effectively. Such informal participation, often by way of amicus briefs, is quite common. The Steelworkers in particular consulted with complaint counsel when the case was before the examiner, and, though complaint counsel chose not to press one legal argument they favored, they themselves urged that argument before the Commission. If intervention implies, in practical terms, that a party has an adequate opportunity to be heard, then, with the exception of procedural privileges at the initial hearing which they did not seek, the Steelworkers may be said to have, in effect, intervened. In their petition for review, however, they argued that intervention implies the right to review and that the denial of intervention in their case was not a denial of any right to be heard, but rather a denial of a right to appeal; they implied, in other words, that the only functional value of formal intervention is that it carries with it the right to appeal.

Though the right to appeal or otherwise seek review of agency action may carry with it the right to intervene,⁶⁹¹ the grant of intervention cannot in itself create a right to judicial review. The fundamental question in the Steelworkers' petition for review was not, therefore, only whether an intervenor may appeal, but whether any party other than one subject to an enforcement order may appeal.

Jurisdiction to review FTC orders is conferred by section 5(c) of the Federal Trade Commission Act⁶⁹² and the virtually identical section 11(c) of the Clayton Act.⁶⁹³ Section 11(c), which governed the *Kennecott* proceedings, provides:

Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business
⁶⁹⁴

In the Senate debate on the FTC Act, it was twice proposed that section 5 be amended to allow a complaining party to obtain judicial review of dismissal of his complaint,⁶⁹⁵ but the amendment was ex-

⁶⁹¹ See notes 39-44 *supra* & accompanying text.

⁶⁹² 15 U.S.C. § 45(c) (1970). The provision has been characterized as one of the narrowest provisions for review of administrative action. 3 K. DAVIS, *supra* note 23, § 22.03, at 214.

⁶⁹³ 15 U.S.C. § 21(c) (1970).

⁶⁹⁴ *Id.*

⁶⁹⁵ See 51 CONG. REC. 13,045, 13,053 (1914).

presssly rejected in favor of the present provision.⁶⁹⁸ Senator Cummins, an opponent of the more liberal provision for review, summarized his objections as follows:

The commission is intended to enforce the law for the public welfare. *It is not intended to try cases between individuals engaged in business.* If you make the commission simply the original trial court as between individuals who may be interested in unfair practices in trade, you will have destroyed, in my judgment, absolutely its usefulness as a public instrumentality for the purposes of correction.⁶⁹⁷

It would appear, then, that the restrictive provision for review was intended to prevent the Commission from becoming a forum for private disputes largely involving competitors. It was early held that review of an enforcement order under the FTC Act and the Clayton Act was available only to a party subject to the order.⁶⁹⁸ Recourse to the legislative history does not resolve the question whether the intent to deny review extended beyond private parties engaged in competition with respondents to encompass groups which, like SOUP and the Steelworkers, assert the interests of large segments of the public. Congress in 1914 apparently assumed that the Commission would adequately represent the interests of the public, the sort of assumption courts today are increasingly willing to question.⁶⁹⁹ The recent phenomenon of public interest intervention could hardly have been foreseen in 1914, nor, for that matter, could a case like *Kennecott*, where the "private" party asserting a right to review dismissal of a complaint was a union representing the interests of its one and one-quarter million members.

An explicit grant of review to one class, without more, does not imply denial to all other classes.⁷⁰⁰ The Supreme Court has stated that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."⁷⁰¹ Absent such evidence, the provisions for review under the Administrative Procedure Act⁷⁰² would apply to any third party not clearly denied review.⁷⁰³ The vagueness of the legislative history will, of

⁶⁹⁸ *Id.* 13,318. In the subsequent debate on the Clayton Act, a similar amendment was offered, *id.* 14,223-24, but replaced at once with the present provision. *Id.* 14,224.

⁶⁹⁷ *Id.* 13,316 (emphasis supplied).

⁶⁹⁸ *Wholesale Grocers' Ass'n v. FTC*, 277 F. 657 (5th Cir. 1922).

⁶⁹⁹ *See* notes 7-12, 94-113 *supra* & accompanying text.

⁷⁰⁰ *See id.*

⁷⁰¹ *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

⁷⁰² 5 U.S.C. §§ 701-06 (1970).

⁷⁰³ These provisions have been held to apply to respondents seeking review of FTC actions other than cease-and-desist orders; the appropriate forum was said to be the district court. *See, e.g., Robertson v. FTC*, 415 F.2d 49 (4th Cir. 1969); *Rettinger v. FTC*, 392 F.2d 454 (2d Cir. 1968). It would appear that third parties appealing similar orders under the APA would be relegated to the district court.

course, make the determination of which parties should be allowed review a difficult one, particularly in cases where "public" and "private" interests are difficult to distinguish.⁷⁰⁴ One possible pattern, however, seems clear: those parties, such as competitors, asserting a direct economic interest in the proceeding might be denied review in favor of those asserting interests shared by large segments of the public. Under this analysis, there would be no reason to deny third parties review of consent orders, as distinguished from enforcement orders resulting from adjudication, even though the party subject to the former waives his right to review.⁷⁰⁵ Moreover, review would not turn upon whether one had participated in the Commission proceedings below.⁷⁰⁶

Participation in FTC proceedings by third parties asserting broad interests and claiming extensive procedural privileges and appellate review is a very recent phenomenon which has been so far confined to the *Campbell*, *Firestone*, and *Kennecott* cases. The extent to which review should be denied such parties should be clarified by Congress, particularly in light of the proposed Consumer Protection Agency, which would be enabled to participate as of right in formal adjudicative proceedings.⁷⁰⁷

Thus *SOUP, Inc. v. FTC*, No. 24,476 (D.C. Cir., filed July 24, 1970), an attempt of a third party to appeal from a consent order, was properly before a court of appeals, while *United Steelworkers v. FTC*, No. 24,629 (D.C. Cir., filed Sept. 15, 1970), should have been brought in a district court. If the old holding in *Wholesale Grocers' Ass'n v. FTC*, 277 F. 657 (5th Cir. 1922), that only a party subject to a cease-and-desist or other enforcement order may appeal, were reaffirmed, third parties might meet the APA's requirement of being "adversely affected or aggrieved" only in that relatively small class of cases in which an enforcement order is not being challenged. The trade association in *Wholesale Grocers* included respondents who had sought review on their own initiative of the cease-and-desist order the association sought to challenge; the shopkeeper in *FTC v. Klesner*, 280 U.S. 19 (1929), was a competitor, and the dispute, as Justice Brandeis noted, 280 U.S. at 28, was "essentially private in its nature"—the sort of dispute Senator Cummins wished to exclude from the FTC. See notes 695-97 *supra* & accompanying text. Neither these cases nor the legislative history of the provisions for review clearly forecloses either the Commission's complaint counsel or a public interest intervenor from obtaining review. As a practical matter, complaint counsel will hold his peace once the Commission has decided against him. If the Commission had so decided in *Kennecott*, a group like the Steelworkers would have been the only party with an incentive to seek review. If it is held that such groups may obtain review under the provisions of the organic act or the Clayton Act, the appropriate forum would of course be the court of appeals. If the right to appeal were grounded on the APA, it might be argued on the basis of *Robertson and Rettinger* (neither of which dealt with cease-and-desist orders) that the court of competent jurisdiction is the district court. It would seem anomalous, however, to have respondents appeal enforcement orders to a court of appeals and other parties appeal to a district court (where the respondent almost certainly would move to intervene). Cf. *Foti v. Immigration & Naturalization Serv.*, 375 U.S. 217 (1963); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970); L. JAFFE, *supra* note 33, at 422. This Comment agrees with Professor Jaffe's conclusion: "I would strive to the greatest extent possible to consolidate review in a single court." *Id.*

⁷⁰⁴ Cf. notes 533-47 *supra* & accompanying text.

⁷⁰⁵ 16 C.F.R. § 2.33 (1971).

⁷⁰⁶ Cf. notes 39-44 *supra* & accompanying text.

⁷⁰⁷ See notes 306-21 *supra* & accompanying text.

4. Funding Public Participation

However the Commission or the court may expand the scope of participation to be afforded third parties in FTC proceedings, the practical problem of funding must be confronted.⁷⁰⁸ In *Firestone* the Commission, to the extent it felt its statutory authority permitted, allowed SOUP to proceed in forma pauperis.⁷⁰⁹ The Court of Appeals for the District of Columbia Circuit subsequently denied SOUP's motion to proceed in forma pauperis on appeal, on the ground that the in forma pauperis statute⁷¹⁰ comprehends only natural persons, and, even if it does apply to a corporation, its individual members must lack the means to pay the costs involved.⁷¹¹ One judge dissented from the order, maintaining that the statutory language does comprehend corporations and that to require evaluation of the personal financial resources of each of a corporation's members would disregard the corporate form, impose an unnecessarily time-consuming burden on the court, and discourage non-indigent individuals unwilling to assume personal liability for costs from joining corporations that might bring suits to promote the public interest.⁷¹²

It is the current policy of the FTC to provide counsel for indigent respondents, including corporations.⁷¹³ If one criterion for permitting a third party to participate in a proceeding is the adequacy of representation of its interest by existing parties, then perhaps counsel should be provided indigent parties whose interests would otherwise be inadequately represented. The tentative standards for intervention advanced in *Firestone*⁷¹⁴ emphasize the potential contribution an applicant might make to the proceeding. An indigent applicant asserting an otherwise inadequately represented interest obviously promises to contribute little, standing alone. If that applicant's interest were effectively articulated by counsel, the potential contribution would be substantially increased. If, however, the Commission itself were to provide counsel to such indigent applicants, it would have, perhaps, too much control

⁷⁰⁸ See notes 289-321 *supra* & accompanying text. The following assessment of the cost to the Commission of participation in hearings gives some suggestion of the financial burden on intervenors:

It is estimated that it costs the Commission approximately \$1,000 per day of trial. This does not include the cost of preparation, briefing, time spent writing the initial decision, etc.

Letter from Joachim Volliard, Office of FTC Commissioner MacIntyre, to the *University of Pennsylvania Law Review* (undated), on file in Biddle Law Library, Univ. of Pa. Law School.

⁷⁰⁹ *Firestone Tire & Rubber Co.*, 3 TRADE REG. REP. ¶19,519 (FTC 1971).

⁷¹⁰ 28 U.S.C. § 1915(a) (1970).

⁷¹¹ *SOUP, Inc. v. FTC*, 5 TRADE REG. REP. ¶73,660 (D.C. Cir., July 27, 1971) (order denying motion to proceed in forma pauperis).

⁷¹² *Id.*

⁷¹³ *American Chinchilla Corp.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶19,059 (FTC 1969). See Comment, *Trumpets in the Corridors of Bureaucracy: A Coming Right to Appointed Counsel in Administrative Adjudicative Proceedings*, 18 U.C.L.A.L. REV. 758, 766-67 (1971).

⁷¹⁴ Notes 658-59 *supra* & accompanying text.

over determining whether their interests were worthy of representation and how staff counsel should present their cases. Alternative approaches might better insure independent control of such applicants' cases.⁷¹⁵

Short of providing counsel, the Commission could take other steps to alleviate the financial burden on indigent intervenors. It could, as it did in *Campbell*,⁷¹⁶ provide a free transcript and, as in *Firestone*,⁷¹⁷ require the intervenor to file one copy of its documents rather than the twenty or twenty-five now required.⁷¹⁸ In *Firestone*, SOUP requested that the Commission pay travel expenses, living expenses, and per diem fees for its witnesses. The Commission declined to rule on the request, pending a determination by the Comptroller General on its statutory authority to make such payments. Chairman Kirkpatrick requested a ruling from the Comptroller General on the matter.⁷¹⁹ At this writing, no ruling has yet been made. Commissioner Jones has suggested that these expenses be considered necessary to the conduct of the Commission's proceedings,⁷²⁰ as are expenses of complaint counsel and Commission witnesses.⁷²¹

D. Federal Agencies Regulating Power Generation

Federal regulation of the generation of energy, primarily electricity, is an extremely complex and highly technical matter. The problems that arise stem from both the nature of the subject matter and the multiplicity of regulatory bodies at various governmental levels charged with responsibility for different, or even identical, subject-matter regulation. Depending upon the energy source used, the generation of electric power may be federally regulated, in some aspects, by two agencies, the Federal Power Commission and the Atomic Energy Commission. The regulatory schemes of both agencies in this area are premised on congressional grants of licensing power over the construction and operation of generating facilities,⁷²² each agency having responsibility for implementing a broad but not unlimited set of federal policies.⁷²³

Public participation in the decisionmaking procedures of the two agencies has developed independently of their common concern with

⁷¹⁵ See notes 285-88 *supra* & accompanying text.

⁷¹⁶ Brief for Petitioner at 14, *SOUP, Inc. v. FTC*, No. 24,476 (D.C. Cir., filed July 24, 1970).

⁷¹⁷ *Firestone Tire & Rubber Co.*, 3 TRADE REG. REP. ¶ 19,519 (FTC 1971).

⁷¹⁸ See 16 C.F.R. § 4.2(c) (1971).

⁷¹⁹ Letter from FTC Chairman Kirkpatrick to Comptroller General Staats, Mar. 17, 1971, copy on file in Biddle Law Library, Univ. of Pa. Law School.

⁷²⁰ See 15 U.S.C. § 42 (1970).

⁷²¹ Letter from FTC Commissioner Mary Gardiner Jones to Comptroller General Staats, Mar. 17, 1971, copy on file in Biddle Law Library, Univ. of Pa. Law School. Cf. Lazarus & Onck, *supra* note 19, at 1100.

⁷²² See, e.g., 16 U.S.C. § 797(e) (1970); 42 U.S.C. § 2133(a) (1970).

⁷²³ See, e.g., 16 U.S.C. § 797(c) (1970); 42 U.S.C. § 2013 (1970).

the regulation of power generation. The following discussion treats each agency separately for this reason. At the same time, however, each discussion will emphasize the licensing of power generating facilities, and these discussions will be followed by a joint discussion focusing on this subject. Two reasons support this approach. First, public concern has singled out this activity of the agencies in recent years, and thus provides sufficient data to suggest problems and trends within the agencies. Second, most recent criticism of such regulation has been directed at the multiplicity of regulatory agencies at the state and federal level charged with responsibility for licensing power plants, the complexity thus injected into the decisionmaking process, and the consequent difficulties presented to those wishing to participate in the agencies' planning and licensing decisions. Recent proposals for improving the decisionmaking process would merge the agencies involved, instituting a consolidated system of licensing under federal authority (one-stop licensing) and formal long-range planning.⁷²⁴ Such proposals carry broad implications for the future role of public participation, and therefore warrant separate treatment.

1. Federal Power Commission

Certificates authorizing the construction and operation of hydroelectric facilities are granted by the Federal Power Commission for periods of up to fifty years.⁷²⁵ As of this time none of the certificates granted by the FPC has expired.⁷²⁶ Consequently, and in contrast to the FCC's emphasis on frequent review of broadcasters' licenses to use the public airways,⁷²⁷ challenges by members of the public to the way in which certified facilities have been operated have been narrowly limited, occurring only in carefully circumscribed ratemaking proceedings.⁷²⁸

⁷²⁴ See text accompanying notes 918-21, 926-30 *infra*.

⁷²⁵ 16 U.S.C. § 799 (1970).

⁷²⁶ Interview with James Michael, Center for the Study of Responsive Law, Washington, D.C., in Washington, D.C., Sept. 27, 1971.

⁷²⁷ See text accompanying notes 325, 337 *supra*.

⁷²⁸ A recent instance of public interest intervention before the FPC occurred in *Gulf Oil Corp., No. C164-26* (FPC 1972), a proceeding to amend a certificate of public convenience and necessity granted Gulf for the sale of 4.4 trillion cubic feet of gas to Texas Eastern Transmission Corporation under a warranty contract. SOUP, the Washington Urban League, Inc., and 50 utilities were granted intervention under § 15(a) of the Natural Gas Act, 15 U.S.C. § 717n (1970). Countering the position taken by all but one of the intervening utilities, they argued that, if granted, the amendment would "ultimately cost the consuming public in excess of \$160 million" and that Gulf should therefore be held to its original contract. Petitioners' Motion for Emergency Relief at 5, *SOUP, Inc. v. FPC, No. 72-1103* (D.C. Cir., filed Feb. 4, 1972). The issue presented in the Motion for Emergency Relief was "[t]o what extent does the public interest require the Commission to immediately provide intervenors recognized [by the Commission] as responsible representatives of the public interest, the loan of a copy of the daily transcript [see 18 C.F.R. § 1.21(a) (1971)] and relief from burdensome service requirements imposed by the Commission's Rules [see 18 C.F.R. §§ 1.15(b), .17(b), .26(c), .29(e) (1971)], irrespective of intervenors' indigent status?" *Id.* SOUP and the Urban League argued that they were "not

Initial certification of new facilities has been a more active area. As will appear below, the FPC has been liberal in admitting members of the public to such hearings so long as they wish to address matters the agency considers its responsibility. But when efforts have been made to invoke judicial review, and subsequently to force the agency to broaden its vision to encompass previously unexplored consequences of its certification, resistance has been frequent.

Despite the FPC's apparent acquiescence to participation at the hearing stage, few members of the public have exercised the opportunity, and the number is smaller yet if participation by competitors who have a substantial economic stake in the outcome is excluded. Traceable to the high cost of presenting an effective case in proceedings which are inherently complex and extraordinarily long, this pattern has a number of potentially unsatisfactory consequences. The agency attempts to limit the number of factors it must take into account in working out the "public interest." Those participants able to afford participation and then gain attention for issues otherwise avoided by the agency are extremely few. Because of this, the agency may often fail to consider the full range of issues relevant to the public interest. But even where it does consider these issues, the agency's perspective may be confined to the narrow interests of the rare intervenor. Fuller consideration is not necessarily better consideration, when the potential for limited or skewed perspectives is so great. Moreover, the effectiveness of judicial review as a prod on agency action is also reduced, when there is only infrequent intervention by narrowly interested groups.

The Federal Power Act (FPA)⁷²⁹ and the Natural Gas Act (NGA)⁷³⁰ are the basic sources for the regulatory authority of the Federal Power Commission.⁷³¹ The FPC's jurisdictional responsibility under each has been expanded judicially over the years and is formulated somewhat differently in each, as will be shown below. Rules governing participation in FPC proceedings under these Acts are, however, identical in at least two respects. First, both statutes make participation discretionary with the Commission:

In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit

attempting to proceed as paupers in the conventional sense, but rather that they should receive financial relief in line with their status as recognized public interest intervenors." *Id.* 9-10; *cf.* notes 709-12 *supra* & accompanying text. The motion was denied on Mar. 9, 1972, and the hearing examiner has not yet reached a decision on the merits. Telephone interview with Stuart Bluestone, Institute for Public Interest Representation, Washington, D.C., May 30, 1972.

⁷²⁹ 16 U.S.C. §§ 791a-825r (1970).

⁷³⁰ 15 U.S.C. §§ 717-717w (1970).

⁷³¹ "The Federal Power Commission has certain specified duties under other statutes, but most of the Commission's time and other resources are consumed in the administration of the two basic Acts." *RESPONSES*, *supra* note 30, at 89. For an exhaustive compilation of other statutes defining the powers and duties of the FPC, see FPC, *FEDERAL POWER ACT* 61-156 (1970).

as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation . . . may be in the public interest.⁷³²

Second, in furtherance of a policy of close cooperation with state regulatory commissions,⁷³³ the Commission has promulgated rules which give any interested state commission an absolute right to intervene in any proceeding,⁷³⁴ relegating all other intervenors to the status of petitioners for the opportunity to intervene.⁷³⁵

a. *The Natural Gas Act*

Under the NGA the Commission is empowered to regulate natural gas companies engaged in interstate transportation, or sale for resale, of natural gas.⁷³⁶ This power is exercised by certification of new facilities, regulation of producer and pipeline rates, and regulation of accounts, records, and securities.⁷³⁷ Applicants for proposed facilities must be granted construction certificates by the FPC, if it finds them "required by the present or future public convenience and necessity,"⁷³⁸ but "such reasonable terms and conditions as the public convenience and necessity may require" may be imposed.⁷³⁹ Before the grant of such a certificate, notice "to all interested parties" and a hearing are mandatory,⁷⁴⁰ even though participation in that hearing is said in the statute to be discretionary.⁷⁴¹

Certification proceedings under the NGA have not been major battlegrounds. As has been observed:

Principal reasons for [the lack of controversy in NGA certifications compared to FPA certifications discussed below] include the fact that a great number of the major natural gas pipeline facilities were constructed throughout the United States under the spur and necessity of war-time needs or postwar-time recovery conditions. Secondly, during both periods, public need for gas utility facility development was not questioned. Third, the emergence of environmental pro-

⁷³² 16 U.S.C. § 825g(a) (1970); *accord*, 15 U.S.C. § 717n(a) (1970).

⁷³³ 18 C.F.R. § 1.37(a) (1971).

⁷³⁴ *Id.* § 1.37(f); *see id.* § 1.8(a)(1).

⁷³⁵ *Id.* § 1.8(a)(2).

⁷³⁶ 15 U.S.C. § 717(b) (1970).

⁷³⁷ *Id.* §§ 717c, f, g, k.

⁷³⁸ *Id.* § 717i(e).

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* § 717i(c).

⁷⁴¹ *Id.* § 717n.

tection as a great goal of our society is of relatively recent origin.⁷⁴²

The pressure on the FPC to admit nongovernmental participants during the periods of greatest construction came from producers of competing fuels and the litigation surrounding those efforts to intervene constituted an important chapter in the judiciary's expansion of the role of the public participant.⁷⁴³ The FPC consistently denied that the NGA's mandate to regulate to further the "public convenience and necessity" required the agency to consider the impact of its regulation of natural gas facilities on competing fuel industries. The reasoning, generally sustained by the courts, was succinctly stated in *Alston Coal Co. v. FPC*,⁷⁴⁴ a ratemaking proceeding:

[T]he purpose of those provisions . . . relating to rates and prices . . . [was] to protect the consuming public against exorbitant and excessive charges [T]he Commission must . . . fix a rate which will yield a fair return The effect of a gas rate upon a competing industry fuel is not a factor which . . . the Commission may consider It follows that petitioners did not have the right . . . to intervene for the purpose of establishing the economic effect a reduction in gas rates would have upon the coal industry.⁷⁴⁵

This was not, of course, the end of the matter. In *National Coal Association v. FPC*,⁷⁴⁶ the court decided that it was appropriate to allow competitors judicial review of NGA certification. Apparently taking a somewhat different view of congressional intent than was expressed in *Alston Coal*, the court decided that all persons who would have a recognized right to obtain judicial review of a Commission order should be allowed to participate initially in the certification hearings.

[T]here are some persons who have a right to participate in Commission proceedings and some who do not. We think it clear that any person who would be "aggrieved" by the Commission's order, such as a competitor, is also a person who has a right to intervene. Otherwise, judicial review, which may be had only by a party to the proceedings before the Commission who has been "aggrieved" by its order, could be denied or unduly forestalled by the Commission merely by denying intervention.⁷⁴⁷

⁷⁴² Nassikas, *Public Participation in Locating Facilities*, 88 PUB. UTIL. FORT., Sept. 16, 1971, at 108, 109.

⁷⁴³ See text accompanying notes 33-120 *supra*.

⁷⁴⁴ 137 F.2d 740 (10th Cir. 1943).

⁷⁴⁵ *Id.* at 741-42.

⁷⁴⁶ 191 F.2d 462 (D.C. Cir. 1951).

⁷⁴⁷ *Id.* at 467. See 15 U.S.C. § 717r(b) (1970); *Juarez Gas Co. v. FPC*, 375 F.2d 595 (D.C. Cir. 1967). See also *Virginia Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364, 368 (D.C. Cir. 1959); *Mississippi River Transmission Corp.*, 39 F.P.C. 486 (1968); *Consolidated Gas Supply Corp.*, 39 F.P.C. 38 (1968).

With some practical justification,⁷⁴⁸ a distinction between certification and ratemaking proceedings has been retained. Because both the judicial review and hearing participation provisions in the NGA apply to all proceedings under that Act,⁷⁴⁹ there seems no firmer ground upon which to place the distinction than assumptions or conclusions concerning congressional intent. As a consequence of the distinction, the history of public participation under the National Gas Act remains of interest primarily for the judicially developed theory of intervention as of right rather than for its practical consequences within the FPC.

Public participation in fact has been allowed fairly freely. Using its statutory grant of discretion to allow intervention, the FPC, with judicial approval, has allowed coal companies to intervene in ratemaking proceedings.⁷⁵⁰ Furthermore, competitors have found the door almost completely open to intervention in ratemaking proceedings, despite the supposed principle of intervention by competitors only to serve the public interest.⁷⁵¹ Finally, the FPC has several industry advisory committees,⁷⁵² which "perform some valuable services in keeping the Commission informed about many developments and in making useful suggestions on policy matters."⁷⁵³

Nevertheless, *National Coal* presents a significant lesson. The FPC had not in fact denied intervention to the competitor in *National Coal*, but instead had asserted its power to deny intervention as one ground supporting a denial of judicial review.⁷⁵⁴ A possible inference is that the agency was more concerned about the scope of the issues to be considered than about the burden of the additional participant. This suggestion finds support in the reviewing court's abrupt affirmance after reciting as the FPC's "substantial evidence," only evidence going affirmatively to the appropriateness of natural gas as a fuel.⁷⁵⁵ The conclusion suggested is that additional parties were not felt objectionable, but independent inquiry into the economic conditions of the coal industry was.

⁷⁴⁸ Professor Jaffe suggests that "[i]n terms simply of injury it is hard to explain a difference in standing of coal interests to contest a decision to certify new gas and one to price it so as to increase competition. But in terms of effect on the administrative process the distinction is valid. The initial decision to certify new gas is taken once and for all and is nearly irreversible. Rates can be changed; they should be flexible and the ratemaking process not too cumbersome." Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 276 n.7 (1961).

⁷⁴⁹ 15 U.S.C. §§ 717b(c), r(b) (1970).

⁷⁵⁰ See *Atlantic Seaboard Corp.*, 35 F.P.C. 158, 159 (1966) | cf. 15 U.S.C. § 717r (1970); 18 C.F.R. § 1.8(b)(3) (1971).

⁷⁵¹ *Fuels Research Council, Inc. v. FPC*, 374 F.2d 842, 853 (7th Cir. 1967). See also *United Fuel Gas Co.*, 28 F.P.C. 30 (1962) | *Northern Natural Gas Co.*, 23 F.P.C. 708 (1960).

⁷⁵² RESPONSES, *supra* note 30, at 92.

⁷⁵³ *Id.* at 86.

⁷⁵⁴ See 191 F.2d at 466-67.

⁷⁵⁵ *Id.* at 467.

b. *The Federal Power Act*

Under the FPA the Commission is empowered to regulate supplies of electric power by licensing non-federal hydroelectric power projects, regulating interstate transmission and wholesale rates of electrical energy, and regulating the securities and accounts, and the mergers, consolidations, and acquisitions, of companies subject to its jurisdiction.⁷⁵⁶ The Commission is not required to license any project, but in those cases in which it chooses to grant licenses its responsibility is not framed in the traditionally expansive term "public interest." Instead licenses are to be issued in accordance with an elaborate list of "conditions,"⁷⁵⁷ including one to the effect that the project

shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes⁷⁵⁸

A general provision adds that the Commission may impose conditions other than those listed in the statute if it wishes,⁷⁵⁹ presumably only so long as they serve some purpose implicit within the Act.

The FPA does not specifically require a hearing before the grant or denial of a license.⁷⁶⁰ The Ninth Circuit, however, has held that section 308 of the Act⁷⁶¹ implicitly requires a hearing prior to the granting of a license.⁷⁶² Under this construction the procedures of the Administrative Procedure Act are automatically incorporated.⁷⁶³ Whether acknowledging this as a proper construction of the FPA or independently determining that, for reasons of its own, a hearing is appropriate, the FPC has apparently adopted the practice of holding a

⁷⁵⁶ 16 U.S.C. § 797 (1970).

⁷⁵⁷ *Id.* § 803.

⁷⁵⁸ *Id.* § 803(a).

⁷⁵⁹ *Id.* § 803(g).

⁷⁶⁰ Hearing procedures for proceedings under the FPA are specified generally in *id.* § 825g, which provides only that "[h]earings under this chapter may be held" Power to issue licenses is conferred on the Commission by *id.* § 797(e), which requires general notice by publication and specific notice to "any state or municipality likely to be interested," *id.* § 797(f), but no hearing pursuant to that notice. Neither the provisions for preliminary permits, *id.* §§ 797(f), 798, 800, nor the provisions conditioning licenses, *id.* §§ 799, 801-03, add such a requirement as a condition to the grant of a license.

In contrast, remedial action for violation of conditions imposed in a license, including revocation, may only be effectuated pursuant to a federal district court judgment. *Id.* § 820.

⁷⁶¹ 16 U.S.C. § 825g (1970).

⁷⁶² *Public Util. Dist. No. 1 v. FPC*, 242 F.2d 672, 678 (9th Cir. 1957). The court declared that: "Under § 308 . . . the order granting the license was a matter required by statute to be determined . . . after opportunity for an agency hearing' within the meaning of § 1004 of Title 5 U.S.C.A."

⁷⁶³ See 5 U.S.C. § 554 (1970).

hearing if a protest is filed to the proposed grant of a license.⁷⁶⁴ The former explanation is unlikely, for if a requirement of a hearing on a record can be inferred from the nature of the license provided for in the FPA, there is no justification for making the hearing conditional. In any event, since the Commission has promulgated no rules or orders either limiting the class of persons who may protest or requiring that protests meet any objective criteria,⁷⁶⁵ it appears that hearings are usually held before the grant of a license, and intervention is freely allowed.

Participation in such hearings is discretionary with the agency,⁷⁶⁶ but, as under the certification provisions of the NGA, the opportunity to participate apparently has not often been withheld. That the FPC has liberally allowed participation may fairly be inferred from the absence of detailed CAB-like rules governing the form of participation.

Yet, as noted at the beginning of this section, meaningful citizen participation before the agency has been "sorely lacking."⁷⁶⁷ Furthermore, interested environmentalists and consumers have met resistance that has caused them to go to the courts for help in forcing the FPC to broaden its concept of its responsibility. *Scenic Hudson Preservation Conference v. FPC*⁷⁶⁸ is the leading case on the standing of conservationists to protect aesthetic and environmental interests by obtaining judicial review,⁷⁶⁹ forcing the FPC to broaden the subject matter under consideration in its licensing hearings. The Second Circuit found that the Conference—"an unincorporated association consisting of a number of non-profit, conservationist organizations"⁷⁷⁰ seeking to present relevant data in opposition to the proposed construction of a hydroelectric plant—had standing in court as a "party . . . aggrieved by an order issued by the Commission."⁷⁷¹ Although the Conference had "sufficient economic interest to establish [its] standing,"⁷⁷² the court added that the FPA "seeks to protect non-economic as well as economic interests,"⁷⁷³ and granted standing to the petitioners on the basis of their non-economic interests.

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, con-

⁷⁶⁴ See 18 C.F.R. §§ 1.10, 4.32 (1970).

⁷⁶⁵ See *id.*

⁷⁶⁶ 16 U.S.C. § 825g(a) (1970).

⁷⁶⁷ See RESPONSES, *supra* note 30, at 85; accord, *Hearings on S. 3434 & S. 2544 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 82 (1970).

⁷⁶⁸ 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁷⁶⁹ See K. DAVIS, *supra* note 23, § 22.19 (Supp. 1970).

⁷⁷⁰ 354 F.2d at 611.

⁷⁷¹ *Id.* at 615-16 (citing 16 U.S.C. § 825l(b) (1970)). *Scenic Hudson* was initiated under the FPA. The parallel provisions under the NGA are found at 15 U.S.C. § 717r (1970), which was the basis for *National Coal*. See note 747 *supra*.

⁷⁷² 354 F.2d at 616.

⁷⁷³ *Id.* at 615.

servational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.⁷⁷⁴

The FPA requires that as a condition for a license, a "project . . . shall be such as . . . will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for . . . beneficial public uses, including recreational purposes" ⁷⁷⁵ The court thought that the statute "encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites," ⁷⁷⁶ and remanded the case with instructions that the FPC admit and consider the evidence that the petitioners sought to offer.⁷⁷⁷

The court's logic on the standing issue has been criticized for being "filled with courageous leaps over intellectual chasms that might never be bridged" ⁷⁷⁸ and for "fail[ing] to connect the injury allegedly suffered . . . with the proposed relief." ⁷⁷⁹ Despite its technical shortcomings, however, the decision clearly shows the court's increasing willingness to supervise the FPC and dictate the breadth of its responsibility.⁷⁸⁰ Apparently *Scenic Hudson* considerably expanded the subject matter which the FPC must consider before granting a license. But it should be noted that when the case reached the court of appeals for the second time, FPC consideration of the impact of its licensing decision was approved on a record that showed a rather limited consideration of the effect the project would have on the environment and of the

⁷⁷⁴ *Id.* at 616.

⁷⁷⁵ 16 U.S.C. § 803(a) (1970).

⁷⁷⁶ 354 F.2d at 614.

⁷⁷⁷ *Id.* at 624. Such consideration was subsequently mandated by the Supreme Court in *Udall v. FPC*, 387 U.S. 128 (1967) (the *High Mountain Sheep* case).

The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.

Id. at 450. Under these decisions, the consideration of non-power interests and the development of a full record are mandatory, see Comment, *Of Birds, Bees, and the FPC*, 77 YALE L.J. 117, 120 (1967), and the FPC has recognized this obligation, see 35 Fed. Reg. 18,958 (1970).

The Second Circuit finally upheld the granting of a license, finding that the Commission's action complied with the remand and was supported by substantial evidence. *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463, 470 (2d Cir. 1971) (*Scenic Hudson II*).

⁷⁷⁸ K. DAVIS, *supra* note 23, § 22.19, at 775 (Supp. 1970).

⁷⁷⁹ Comment, *Standing of Conservation Organizations to Challenge Federal Administrative Action in Federal Court*, 12 B.C. IND. & COM. L. REV. 637, 642 (1971).

⁷⁸⁰ Cf. Tarlock, *Preservation of Scenic Rivers*, 55 Ky. L.J. 745, 777 (1967).

available alternatives to that installation.⁷⁸¹ In fact, the issues examined appear to have been limited to the impact of the one project rather than a "comprehensive plan" as called for by the FPA,⁷⁸² and to the impact that project would have on an environment limited by the distance from which the installation could be seen, as a scathing dissent pointed out.⁷⁸³ Although the public participants in the proceeding included only nearby townships and groups of people concerned with the preservation of the Hudson River,⁷⁸⁴ the impact of the license will undoubtedly extend well beyond that area.

c. *The Public Interest and the Power Commission*

If public participation is thus limited in impact, it seems appropriate to consider the ways in which, within the context of the present federal regulatory structure, the deficiencies may be remedied, and whether there is room for adaptation of public participation to provide those remedies.

The expense and technical complexity of litigating before the FPC is recognized by the Commission to be "a very practical obstacle to widespread citizen participation."⁷⁸⁵ This obstacle was judicially noted in *Scenic Hudson* in responding to the FPC's fears of thousands seeking intervention and review: "Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken."⁷⁸⁶ By the time *Scenic Hudson* initially reached the Second Circuit, the Conference had expended \$250,000, with the hearing on remand still awaiting.⁷⁸⁷ Few environmental or consumer groups possess the resources or staff to present such technical evidence as possible alternative sources of electrical energy, the effects on a river's oxygen caused by projects, or the thermal effects on fish.⁷⁸⁸ Moreover, the difficulty of obtaining engineers or other qualified wit-

⁷⁸¹ 453 F.2d 482-85 (Oakes, J., dissenting). Cf. Comment, *supra* note 777, at 121. For a comprehensive report on the FPC response to environmental concern, see 50 FPC ANN. REP. 4-5 (1970); Bagge, *The Federal Power Commission*, 11 B.C. IND. & COM. L. REV. 689, 719-20 (1970). See also RESPONSES, *supra* note 30, at 87.

⁷⁸² See note 758 *supra* & accompanying text. The court appears to have attached no significance to the fact that the project was not geared to "improving or developing a waterway," as 16 U.S.C. § 803(a) (1970) requires. See 453 F.2d at 467.

⁷⁸³ See 453 F.2d at 492 (Oakes, J., dissenting).

⁷⁸⁴ The parties and intervenors are listed at 453 F.2d at 464-65; 354 F.2d at 610.

⁷⁸⁵ RESPONSES, *supra* note 30, at 86.

⁷⁸⁶ 354 F.2d at 617.

⁷⁸⁷ Comment, *supra* note 777, at 120.

⁷⁸⁸ Kitzmiller, *Environmental Preservation: Organizing and Protecting Consumer and Conservation Issues in an Administrative Proceeding*, in PROCEEDINGS OF THE FEDERAL HEARING EXAMINERS' SEVENTH ANNUAL SEMINAR 34, 50 (1969).

The Sierra Club, however, may be able to make an adequate evidentiary showing, as it has nearly 100,000 members, a budget of \$3,000,000, and a 60-man staff with 20 volunteer attorneys. See *Sierra Club Mounts a New Crusade*, BUSINESS WEEK, May 23, 1970, at 64-65.

nesses to testify is exacerbated by the fact that most of the experts on those matters have allegiance to power companies.⁷⁸⁹

The Commission has recently considered the extent to which participants in FPC proceedings may receive public financial support. In 1970, People Organized to Win Effective Regulation (POWER) was allowed to intervene in rate increase hearings but the Commission

den[ied] the request by POWER that it be allowed an initial \$10,000 in costs and fees payable by the Commission to act as public interest and consumer surrogate in lieu of the Commission. Although the participation of POWER and all other parties is encouraged in this proceeding, the Commission has not and will not abdicate its mandate to represent the public interest. Therefore, a volunteer surrogate will not be appointed in lieu of the Commission.⁷⁹⁰

The Commission did, however, allow intervening parties leave to proceed in forma pauperis in order to receive a transcript without charge or to be relieved of filing copies of written submissions and of serving copies upon other parties.⁷⁹¹

The Commission and the public interest seem, however, to be in a state of equilibrium:

Increasingly, matters coming before the Commission involve complex issues of industrial technology, law, economics and finance. This acts as a very real limitation on effective participation by the individual citizen or private citizen groups unless they have substantial resources to employ the required expertise. On the other hand, our liberal policy of allowing all interested parties to intervene . . . docs bring into play powerful forces that represent the consumer and the general public, or whose interests are essentially the same.⁷⁹²

It has been suggested that "perhaps all we have to do is raise the [environmental] question to a responsive commission which, recognizing that it may face a court review, should then . . . of its own motion see that the question was properly answered."⁷⁹³ The principle of intensive staff involvement in the planning and execution of service and facility proposals has been called regulatory "activism."⁷⁹⁴ In appro-

⁷⁸⁹ See Kitzmiller, *supra* note 788, at 51.

⁷⁹⁰ Initial Rates for Future Sales of Natural Gas for All Areas, 44 F.P.C. 655, 657 (1970).

⁷⁹¹ *Id.* at 659.

⁷⁹² RESPONSES, *supra* note 30, at 110.

⁷⁹³ Kitzmiller, *supra* note 788, at 36. But cf. *Rocky Mountain Power Co. v. FPC*, 409 F.2d 1122, 1129 n.29 (D.C. Cir. 1969).

⁷⁹⁴ Seder, *Regulatory Activism—The Aftermath of Scenic Hudson*, in ABA PUB. UTIL. L. SECTION ANN. REP. 3, 8 (1969).

priate cases, the FPC staff ⁷⁹⁵ should move beyond the mere consideration of competing proposals to directing the parties to consider alternatives or even to preparing its own proposals,⁷⁹⁶ a practice which the staff has occasionally followed with limited success. Staff investigation could obviate much of the need for costly and time-consuming intervention, thereby removing a burden that citizen groups must otherwise shoulder. Staff initiative and intervention, however, may present due process/requisite notice problems.⁷⁹⁷ According to one authority, "If . . . the Commission favors an alternative not comprehended by the original public notice, due process would appear to require additional notice and opportunity for hearing."⁷⁹⁸ Meeting such requirements might produce endless delay and repetitious proceedings.⁷⁹⁹

Whether the FPC staff or citizen groups should bear the responsibility of protecting the public's concern with the environment or whether public intervention should increase, are questions which can be expected to be asked with increasing frequency. The National Environmental Policy Act of 1969 (NEPA) ⁸⁰⁰ directs all federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," ⁸⁰¹ and to "initiate and utilize ecological information in the planning and development of resource-oriented projects."⁸⁰² The FPC has adopted rules to implement the NEPA.⁸⁰³

Judicial and congressional requirements alone, irrespective of citizen intervention, can, of course, lead to added delay in the administrative process.

⁷⁹⁵ The Commissioners themselves rely very heavily on the expertise of the staff on specialized questions of law, engineering, economics, and accounting. See RESPONSES, *supra* note 30, at 111. Similarly, some intervenors rely on the FPC staff analysis of a proposed project. Telephone interview with William Arkin, Staff of FPC General Counsel, Aug. 17, 1971.

⁷⁹⁶ Seder, *supra* note 794, at 17. Notwithstanding the requirement that the FPC fully consider alternatives presented by parties to proceedings under *Scenic Hudson*, "the role of the agency in encouraging or directing the presentation of alternatives should be limited principally to situations in which a clearly-defined question of public policy presented by the application can best be resolved by formulating and presenting an alternative proposal." *Id.*

⁷⁹⁷ *Id.* 15.

⁷⁹⁸ *Id.*

⁷⁹⁹ See, e.g., *Manufacturers Light & Heat Co.*, 39 F.P.C. 294 (1968); *Pacific Gas Transmission Co.*, 40 F.P.C. 1147 (1968); *Great Lakes Transmission Co.*, 37 F.P.C. 1070 (1967).

The remand of the *High Mountain Sheep* case, 387 U.S. 428 (1967), is perhaps the most sterling example of regulatory activism. The FPC staff, which had testified about power supply resources, see Initial & Reply Brief of Commission Staff Counsel at 58, *Pacific Northwest Power Co.*, Project No. 2243 (FPC, Feb. 23, 1971) (Presiding Examiner's Initial Decision on Remand), developed in its own cost estimates, *id.* 66-102, and asserted the same sentiment for environmental protection which would be expected from the conservation groups.

⁸⁰⁰ 42 U.S.C. §§ 4321 *et seq.* (1970).

⁸⁰¹ *Id.* § 4332(D).

⁸⁰² *Id.* § 4332(G).

⁸⁰³ See 18 C.F.R. §§ 2.80-82 (1971).

The question as to whether the agency's decision-making processes operate with reasonable speed is not a simple one. . . . The problems arise when unique situations are presented or there are parties opposing one another. When a matter goes to full hearing, there are many opportunities for delay, either intentional or unintentional. Some delay is inherent and, indeed, essential to a full consideration of all relevant factors, particularly with the increased concern . . . on the part of the public . . . [with] the environment. In the past, the Commission has not given as much attention to environmental factors as it should have, with the result that our expertise is not fully developed. This can lead to delay when we have to grapple with unfamiliar areas of concern⁸⁰⁴

The "unprecedented concern and agitation for the environment"⁸⁰⁵ has delayed the construction of new power facilities as the demand for power approaches the crisis stage. After nine years,⁸⁰⁶ the *Scenic Hudson* battle has finally been resolved⁸⁰⁷ and Consolidated Edison has made a number of concessions,⁸⁰⁸ and it is not at all clear whether the public interest will be served by further delay.⁸⁰⁹ Where the choice is one between air-conditioning in the summer and cheap power in the ghetto, as opposed to healthy fish swimming in crystalline streams, the value of intervention by environmentalists is not always clear. "[M]any of these groups may have their own interests to protect which, while protecting one group of citizens, may be adverse to another group."⁸¹⁰ For example, landowners, claiming that the public interest commands intervention, may intervene to delay proceedings in order "to force higher prices for rights of way."⁸¹¹ The "flood of horrors" argument offered in opposition to increased participation has been consistently rejected,⁸¹² but agencies must be aware of what interests are being urged and what risks accompany them.

⁸⁰⁴ RESPONSES, *supra* note 30, at 87 (Statement of Chairman White).

⁸⁰⁵ Ramey & Murray, *Delays and Bottlenecks in the Licensing Process Affecting Utilities: The Role of Improved Procedures and Advance Planning*, 1970 DUKE L.J. 25, 28.

⁸⁰⁶ Thimmesch, *Lilliputian Ecologists Hogtie Utility Giants*, Evening Bulletin (Philadelphia), Oct. 5, 1971, at 29, col. 1. Intervenor expenses have now risen above the half-million dollar mark. *Id.* col. 3.

⁸⁰⁷ See *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971).

⁸⁰⁸ *Id.* at 466.

⁸⁰⁹ The controversial Blue Ridge hydroelectric project is presently being challenged by environmental groups and political units and promises to be a protracted proceeding. See N.Y. Times, Nov. 12, 1971, at 18, col. 1.

⁸¹⁰ RESPONSES, *supra* note 30, at 85.

⁸¹¹ *Id.* 87.

⁸¹² See, e.g., *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d at 617:

We see no justification for the Commission's fear that our determination will encourage "literally thousands" to intervene and seek review in future proceedings.

In 1960, Dean Landis castigated the FPC as representing "the outstanding example in the federal government of the breakdown of the administrative process."⁸¹³ This statement was largely provoked by the enormous backlog of cases before the FPC, including several thousand individual gas producer rate cases.⁸¹⁴ By 1969, producer rate cases numbered six, due to the implementation of the procedure of setting area rates.⁸¹⁵ The hearing process has also been simplified by use of prehearing conferences, filing of written rather than oral testimony, independent accounting certifications, and bifurcated hearings which encourage settlement after the first phase.⁸¹⁶

From all indications, then, it appears that the FPC has been liberal in its intervention policy. Yet dissatisfaction with the results of the agency's work is widespread, and appears to come from members of the public not represented in the hearing process, experts in the field, and judges, with equal vigor. If a broader base of public participation is to be found, and the frequency of such participation increased, without a restructuring of the FPC or an enormous increase in the administrative burdens of the agency, perhaps the most appropriate solution is a decrease in formal participation and the expansion of the FPC advisory committees to include concerned citizen groups, a proposal urged by former FPC Chairman White.⁸¹⁷ Alternatively, Commissioner Bagge has suggested the establishment of a formalized consultative process between government and business, joint planning, and increased reliance on rulemaking at the expense of adjudication.⁸¹⁸

2. Atomic Energy Commission

The Atomic Energy Commission is charged by the Atomic Energy Act⁸¹⁹ with broad responsibility for the licensing and regulation of nonmilitary aspects of the development and application of atomic

... Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.

Accord, Associated Indus., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

⁸¹³ CHAIRMAN OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 54 (Comm. Print 1960).

⁸¹⁴ Bagge, *supra* note 781, at 690.

⁸¹⁵ *Id.* See also Jaffe, *The Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 A.C. INT. & COM. L. REV. 565, 569 (1970).

⁸¹⁶ RESPONSES, *supra* note 30, at 88.

⁸¹⁷ *Id.* 86.

⁸¹⁸ Bagge, *Broadening the Supply Base—A Proposal to Eliminate Producer Price Regulation*, 3 NAT. RES. LAW. 430, 432 (1970).

⁸¹⁹ 42 U.S.C. §§ 2011-96 (1970).

energy. A nonexhaustive list of those activities that are licensed by the AEC includes the construction and operation of any facility producing or using nuclear material, and the possession, shipment, or disposal of such material.⁸²⁰ While intervenors have been active in other areas of AEC concern,⁸²¹ the most significant proceedings in terms of public participation and volume of litigation are applications for licenses authorizing the construction of new nuclear power plants.⁸²² Standards for issuance of such licenses are stated generally in the Act:

The Commission shall issue such licenses on a non-exclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public.⁸²³

Additionally, all power-generating facilities licensed by the AEC are explicitly subjected by the Act to regulation by the Federal Power Commission under the Federal Power Act.⁸²⁴

a. *The Licensing Proceeding*

Section 185 of the Atomic Energy Act⁸²⁵ establishes a two-stage licensing process through which an applicant may secure the permission of the AEC to operate a nuclear power plant. The first stage involves the issuance of a provisional construction permit, which may be secured only after a mandatory public hearing.⁸²⁶ The issuance of an operating license, which comprises the second stage of the licensing procedure, may occur without another public hearing unless one is requested by

⁸²⁰ For a complete listing of AEC licensing responsibilities, see 42 U.S.C. §§ 2073, 2139 (1970).

⁸²¹ See, e.g., *City of New Britain v. AEC*, 308 F.2d 648 (D.C. Cir. 1962) (municipality opposing licensing of trucking firm to receive, store, and dispose of radioactive waste).

⁸²² An analysis of the role of public representatives in the AEC rulemaking process will not be extensively treated. In conformity with the Administrative Procedure Act, 5 U.S.C. §§ 553-54 (1970), the AEC has provided for formal hearings in licensing cases and informal hearings, with public participation limited to written submissions and non-record interviews, in rulemaking proceedings. See Siegel v. AEC, 400 F.2d 778, 785-86 (D.C. Cir. 1968).

⁸²³ 42 U.S.C. § 2133(b) (1970).

⁸²⁴ *Id.* § 2019.

⁸²⁵ *Id.* § 2235.

⁸²⁶ See *id.* § 2239(a).

an interested person.⁸²⁷ The mandatory hearing requirement at the construction permit stage recognizes that the grant of permission to build is the most critical decision in the licensing process.⁸²⁸

Upon receipt, an application for a construction permit⁸²⁹ is evaluated by the AEC's Division of Reactor Licensing, which normally consults with the applicant to solve problems discovered in its review of the applicant's preliminary safety report.⁸³⁰ During the review of a construction permit application, the regulatory staff analyzes the safety features of the application and balances the risk of a major accident against the cost to the applicant and the benefit to society of having the utility.⁸³¹ This process involves extended informal discussions and negotiations between the staff and the industry applicant, where "the staff may yield more than the public interest would allow."⁸³² An independent review of the safety of the proposed project is required to be made by the Advisory Committee on Reactor Safeguards,⁸³³ and this report and the AEC staff's safety evaluation are then introduced as evidence at the mandatory hearing.⁸³⁴ At an uncontested hearing the Atomic Safety and Licensing Board does not consider the evidence de novo but determines whether the AEC staff review has been adequate to support the proposed findings.⁸³⁵ If an application is contested, either by the AEC regulatory staff or by an intervening party, then the board will make an independent determination of any matters in con-

⁸²⁷ *Id.*

⁸²⁸ See H.R. REP. NO. 1966, 87th Cong., 2d Sess. 8 (1962) (emphasizing importance of the fact that site selection is finally determined at this stage of the process). See also *Power Reactor Dev. Co. v. Union of Elec. Workers*, 367 U.S. 396, 417 (1961) (dissenting opinion) (recognizing that the investment of millions of dollars subsequent to the grant of a construction permit would make decisions at that stage practically irreversible).

For a detailed discussion of the construction permit process, see Kingsley, *The Licensing of Nuclear Power Reactors in the United States*, 7 *ATOM. EN. L.J.* 309 (1965). See also AEC, *LICENSING OF POWER REACTORS* (1967); Murphy, *Atomic Safety and Licensing Boards: An Experiment in Administrative Decision Making on Safety Questions*, 33 *LAW & CONTEMP. PROB.* 566 (1968); Note, *The Regulation of Nuclear Power After the National Environmental Policy Act of 1969*, 24 *RUTGERS L. REV.* 753, 755-58 (1970).

⁸²⁹ For the required contents of an application, see 10 C.F.R. §§ 50.33-34 (1972); *id.* § 50, App. B-E.

⁸³⁰ See Kingsley, *supra* note 828, at 319-20.

⁸³¹ Ellis & Johnston, *Licensing of Nuclear Power Plants by the Atomic Energy Commission* 7 (1971) (tent. staff report prepared for the Administrative Conference).

⁸³² Cavers, *Administering That Ounce of Prevention: New Drugs and Nuclear Reactors—II*, 68 *W. VA. L. REV.* 238, 242 (1966); *cf.* *RESPONSES*, *supra* note 30, at 789 ("The AEC regulatory staff operates under the philosophy of making an independent assessment of the safety of a proposed nuclear facility or installation. Although this assessment requires much of the information to be provided by the regulated enterprises, independent calculations are made in appropriate areas . . .").

⁸³³ See 42 U.S.C. § 2039 (1970). The Advisory Committee on Reactor Safeguards consists of fifteen members of the scientific community, who are appointed by the Commission and serve on a part-time basis. See Kingsley, *supra* note 828, at 322-24.

⁸³⁴ See Kingsley, *supra* note 828, at 326-28.

⁸³⁵ Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 43 *NOTRE DAME LAW.* 633, 642 (1968).

trovery.⁸³⁶ "By the time the recommendations reach the board—and are first made public—the staff, ACRS, and the applicant have ironed out all of their differences. In a subsequent public hearing all three will present a united front against anyone seeking to challenge the results of their private deliberations."⁸³⁷ The "public hearings are mere window dressing,"⁸³⁸ with the "basic licensing decisions . . . made by technical specialists operating beyond effective public scrutiny."⁸³⁹ This situation is compounded by the fact that "the reactor licensing program is presently conducted with some degree of bias in the direction of technological advance."⁸⁴⁰ It becomes clear that "once a construction permit proceeding emerges into the public arena with the imprimatur of the ACRS and the AEC regulatory staff affixed to the license application, the presumption is that the permit will be issued, and all official efforts are exerted in behalf of issuance of the permit."⁸⁴¹ Any member of the public challenging issuance must bear a heavy burden of proof.⁸⁴²

b. *Intervention Before the AEC*

The Commission's intervention rules state:

(a) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition . . . to intervene. . . . The petition shall set forth the interest of the petitioner in the proceeding, how that interest may be affected by Commission action, and the contentions of the petitioner in reasonably specific detail. A petition which sets forth contentions relating only to matters outside the jurisdiction of the Commission will be denied.

(d) An order permitting intervention may be conditioned on such terms as the Commission or presiding officer may direct.

⁸³⁶ See AEC, *LICENSING OF POWER REACTORS* 9 (1967).

⁸³⁷ Ellis & Johnston, *supra* note 831, at 15.

⁸³⁸ Green, *supra* note 835, at 652.

⁸³⁹ *Id.* 653.

⁸⁴⁰ *Id.* 649. Dr. Glenn T. Seaborg, former chairman of the AEC, however, has stated that the licensing and regulatory branches of the AEC "were relatively free of the influence of these branches that promote the use of atomic energy." N.Y. Times, Sept. 16, 1971, at 14, col. 1.

⁸⁴¹ Green, *supra* note 835, at 655. Cf. Ellis & Johnston, *supra* note 831, at 42.

⁸⁴² Dr. Seaborg suggested that the burden of proof at the hearing be inverted and that the AEC staff counsel "adopt the posture of representing the interest of the public health and safety. Rather than exerting his efforts on behalf of the applicant as is now done, he could very easily put the applicant to its proof" Green, *supra* note 835, at 656. Dr. James R. Schlesinger, present AEC chairman, by redefining the agency's role as that of performing "as a referee serving the public interest," has indicated that the AEC is moving in this direction. See N.Y. Times, Oct. 21, 1971, at 23, col. 4.

. . . The granting of a petition to intervene does not change or enlarge the issues specified in a notice of hearing unless otherwise expressly provided in the order allowing intervention.⁸⁴³

Pursuant to these rules, the AEC has consistently espoused a liberal policy in favor of granting intervention to interested members of the public,⁸⁴⁴ including labor unions,⁸⁴⁵ state and local governments,⁸⁴⁶ and conservation groups.⁸⁴⁷

The present rigidity in AEC intervention procedures partially explains the Commission's apparent willingness to grant intervention to representatives of the public. The Atomic Energy Act commands that "the Commission *shall* grant a hearing upon the request of any person whose interest may be affected by the proceeding, and *shall* admit any such person as a party to such proceeding."⁸⁴⁸ This provision has been interpreted to leave some room for administrative discretion to deny participation to persons whose interests are already adequately represented by other parties.⁸⁴⁹ The Commission, however, has failed to formulate any rule of procedure to deal with the problem of persons seeking to intervene for the purpose of raising the same issues,⁸⁵⁰ thereby inhibiting board exercise of its discretionary power to deny intervention.

The rules governing the status of nonintervening participants in construction permit hearings further inhibit the exercise of discretion in the consideration of petitions to intervene.

⁸⁴³ 10 C.F.R. §§ 2.714(a), (d) (1972).

⁸⁴⁴ See, e.g., Ramey, *The Role of the Public in the Development and Regulation of Nuclear Power*, 12 *ATOM. EN. L.J.* 3, 17 (1970) (remarks of AEC Commissioner Ramey at the Conference on Nuclear Energy and the Environment, Apr. 4, 1970); Hennessey, *Atomic Energy Law—A Look Into the Future*, 12 *ATOM. EN. L.J.* 235, 247 (1970) (address by AEC General Counsel Hennessey to the ALI-ABA Joint Committee on Continuing Legal Education Course of Study on Atomic Energy Licensing and Regulation, Sept. 10, 1970).

⁸⁴⁵ See, e.g., *Power Reactor Dev. Co.*, 1 A.E.C. 1 (1956), *aff'd*, 367 U.S. 396 (1961), *rev'd* 280 F.2d 645 (D.C. Cir. 1960).

⁸⁴⁶ See, e.g., *Consumers Power Co.*, 1 A.E.C. 300 (1960); Department of Water & Power, 3 A.E.C. 1 (1965).

⁸⁴⁷ See, e.g., Department of Water & Power (Malibu Nuclear Plant Unit No. 1), 3 A.E.C. 122 (1966) (board granted intervention to the Malibu Citizens for Conservation, Inc., in construction permit proceeding).

⁸⁴⁸ 42 U.S.C. § 2239(a) (1970) (emphasis added). See also *RESPONSES*, *supra* note 30, at 779. One commentator has observed that a statutory provision which gives any interested person a right to be a party is undesirable, insofar as it may tend to limit the discretion of agencies to control the hearing process by denying intervention to those persons whose interests are adequately represented by existing parties. See Shapiro, *supra* note 37, at 766-67.

⁸⁴⁹ See *Cities of Statesville v. AEC*, 441 F.2d 962, 977 (D.C. Cir. 1969).

⁸⁵⁰ The Civil Aeronautics Board has promulgated seven criteria to guide the hearing examiner in his determination whether or not to permit formal intervention. See 14 C.F.R. § 302.15(b) (1971) & note 514 *supra*. See also 18 C.F.R. § 1.8(b) (2) (1971) (Federal Power Commission regulation indicating that intervention need not be granted if petitioner's interest is adequately represented by existing parties).

A person who is not a party may . . . be permitted to make a limited appearance by making oral or written statement of his position on the issues within such limits and on such conditions as may be fixed by the presiding officer, but he may not otherwise participate in the proceeding.⁸⁵¹

The above "limited appearance provision" does not bestow the limited participant with a full panoply of litigation rights and would not appear to satisfy the statutory command that interested persons affected by a proceeding be accorded the rights of a party.⁸⁵² As a result, the board knows that if it denies intervention on the grounds that a person's interests are adequately represented and relegates such person to a limited appearance status, the proceeding may be subject to successful challenge on review if it turns out that their interests were not so represented at the hearing. Thus, under the present rules, the failure of the limited appearance provision to allow enough flexibility to permit nonparties the privilege of cross-examination, discovery,⁸⁵³ and the opportunity to avail themselves of the appellate review procedure⁸⁵⁴ dictates that intervention be granted in order to minimize the risk of reversal.⁸⁵⁵ The procedural rules regarding limited appearances should be changed to permit limited participants the right of cross-examination and other procedural rights, when it becomes apparent during the course of the hearing that the person's interests are not in fact adequately represented.⁸⁵⁶ Combined with more selective granting of intervention, this would provide a means for greater control over the hearing process, while satisfy-

⁸⁵¹ 10 C.F.R. § 2.715(a) (1972).

⁸⁵² See 42 U.S.C. § 2239(a) (1970); RESPONSES, *supra* note 30, at 780 ("The Commission encourages members of the general public to state their position or to raise any questions they wish, within the scope of the issue of the proceeding and AEC jurisdiction. However, such persons do not become parties and their statements or presentations are not part of the record for decision.").

⁸⁵³ The Commission may, "on motion of any party showing good cause and on notice to all other parties," order discovery. 10 C.F.R. § 2.741 (1972). Only intervenors can get discovery, and petitions for leave to intervene are not acted upon until notice of the mandatory hearing is issued. This would appear to be an extremely short time for an intervenor to fully prepare his case. "Because of the timing of an intervention in AEC hearings, the largest problem intervenors face is getting information early enough to analyze issues." Letter from Myron M. Cherry, Businessmen for the Public Interest, to the *University of Pennsylvania Law Review*, Oct. 5, 1971, on file in Biddle Law Library, Univ. of Pa. Law School. It has been suggested, however, that "[i]f . . . petitioners are allowed to intervene and require time for discovery, the board may in its discretion adjust the date of the hearing as the circumstances may indicate." Department of Water & Power, 2 A.E.C. 445 (1964). See also 10 C.F.R. § 2.744 (1972) (limited access to AEC records).

⁸⁵⁴ 10 C.F.R. § 2, App. A, III(b) (5) (1972).

⁸⁵⁵ Compare the AEC rule on limited appearances, *supra* note 851, with the Civil Aeronautics Board's rule 14, which governs informal participation in CAB proceedings. See notes 524-25 *supra* and accompanying text.

⁸⁵⁶ Cf. *Palisades Citizens Ass'n v. CAB*, 420 F.2d 188 (D.C. Cir. 1969) (CAB's denial of formal intervention to certain public interest groups held not to be error, where the groups were given the opportunity to present exhibits and to cross-examine witnesses pursuant to CAB rule 14 and to participate in oral argument before the examiner, a privilege not mentioned on the face of the rule).

ing the statutory requirement that interested persons be given the status of parties.

The AEC has to some extent modified the rigidity of its intervention scheme by directing that representatives of interested states which are not parties be afforded "a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission" without being required to take a position with respect to the issues.⁸⁵⁷ In any future rule change, this special form of intervention might be extended to those experienced public interest groups who are perhaps better able than many government units to protect the public interest in defined controversial areas.

In addition to the constraints imposed by the intervention rules, the AEC's general lack of discrimination as to the type of person or group allowed to intervene may be attributed to the Commission's longstanding desire to draw the public into the hearing process.⁸⁵⁸ This may in large measure be explained by the fact that construction permit proceedings have been considered to function simply as a forum in which "[m]embers of the public . . . can intervene . . . and can call witnesses and cross-examine in order to try to satisfy themselves as to the safety of the proposed plant."⁸⁵⁹ The primary purposes of the hearing—to convince the public that the AEC staff has diligently reviewed an application and to demonstrate that it is decidedly in the public interest⁸⁶⁰—are actually promoted by liberally providing a public forum.

As a result of the factors noted above, denials of petitions to intervene have been relatively few in number. In those cases where it has occurred, two frequently cited grounds for denial have been that the petition to intervene alleged issues relating only to matters outside the jurisdiction of the Commission or contained contentions that tended to change or enlarge the issues to be considered at the hearing. Such denials have included a case where the petitioner sought only to challenge the constitutionality of the Atomic Energy Act⁸⁶¹ and instances where petitioners attempted to raise antitrust considerations at construction permit hearings.⁸⁶²

⁸⁵⁷ 10 C.F.R. § 2.715(c) (1972).

⁸⁵⁸ Telephone interview with A. W. Murphy, Professor of Law at Columbia University and a member of the Atomic Safety and Licensing Board Panel, Aug. 16, 1971.

⁸⁵⁹ Ramey, *supra* note 844, at 17. See note 838 *supra* & accompanying text.

⁸⁶⁰ *Report to the Atomic Energy Commission by the Regulatory Review Panel (Mitchell Panel) (1965)*, in *Hearings on Licensing & Regulation of Nuclear Reactors Before the Joint Comm. on Atomic Energy*, 90th Cong., 1st Sess., pt. 1 App., at 415 (1967); Ellis & Johnston, *supra* note 831, at 42; Green, *supra* note 835, at 639-40.

⁸⁶¹ See *Toledo Edison Co. & Cleveland Elec. Illuminating Co. (Davis-Besse Nuclear Power Station)*, 2 CCH ATOM. EN. L. REP. ¶11,594.01, at 17,735-2 (1971).

⁸⁶² See, e.g., *Cities of Statesville v. AEC*, 441 F.2d 962, 967 (D.C. Cir. 1969) (court granted intervention but refused to consider the antitrust issues).

The AEC must now pass on the anticompetitive effect of an application prior to issuing a construction permit. See 42 U.S.C. §§ 2132-35 (1970); 10 C.F.R. §§ 50.41-

Other grounds for denying intervention are that the petition failed to conform with the AEC's technical rules of practice⁸⁰³ or that the petition was not filed within the required time.⁸⁰⁴ The Commission's rules state that "[a] petition for leave to intervene which is not timely filed will be dismissed unless the petitioner shows good cause for failure to file it on time."⁸⁰⁵ In *Easton Utilities Commission v. AEC*,⁸⁰⁶ the court found the AEC's right to so limit intervention to reside in its statutory authority to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of [the Atomic Energy Act]."⁸⁰⁷ The court acknowledged that the orderly conduct of public business demands that there be agency discretion to deny an untimely application, notwithstanding the governing statutory language indicating that a person has an affirmative right to intervene based on the interest he presents.⁸⁰⁸

Another consideration in acting upon a petition to intervene is whether a petitioner's interests will in fact be affected by the proceeding.⁸⁰⁹ This determination must necessarily be made on a case-by-case basis and is not amenable to detailed rulemaking. In the *Diablo Canyon* construction permit hearing,⁸⁷⁰ a conservation group and an individual filed a joint petition to intervene. Both sought intervention to contest the ecological, health, and safety effects of a proposed nuclear power plant. The environmentalist group asserted that approximately ten of its members resided within ten to fifty miles of the proposed plant, and was allowed to intervene. A decision on the status of the single individual, who lived 112 miles from the site, was deferred pending an inquiry into the frequency of his visits to the plant area. The petitioner failed to reply to the inquiry and intervention was denied. This decision indicates that geographic proximity may be an element in the determination of whether a person's interest is affected to such an extent that intervention must be granted.⁸⁷¹ On the other hand, the board

.42, .55b (1972). This opportunity to challenge an application will likely increase the number of interventions and further delay the application process. See Ellis & Johnston, *supra* note 831, at 30-33.

⁸⁰³ See, e.g., *Northern States Power Co. (Monticello Nuclear Generating Plant)*, 3 A.E.C. 216, 217 n.2 (1967) (local citizens group's petition to intervene denied for failure to "set forth the interest of the petitioner, how that interest would be affected by Commission action, and the contentions of petitioner").

⁸⁰⁴ See, e.g., *Consolidated Edison Co. (Indian Point Station Unit No. 2)*, 3 A.E.C. 162 (1966).

⁸⁰⁵ 10 C.F.R. § 2.714(a) (1971).

⁸⁰⁶ 424 F.2d 847 (D.C. Cir. 1970).

⁸⁰⁷ *Id.* at 851 (citing 42 U.S.C. § 2201(p) (1964)).

⁸⁰⁸ *Id.* at 852.

⁸⁰⁹ See 42 U.S.C. § 2239(a) (1970).

⁸⁷⁰ *Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant)*, 2 CCH ATOM. EN. L. REP. ¶ 11,270.01 (1968).

⁸⁷¹ Cf. *Petition to Intervene, Point Beach Nuclear Plant, Unit No. 2*, 2 CCH ATOM. EN. L. REP. ¶ 11,276 (1968), where the petitioners Businessmen for the Public Interest, Sierra Club, and Protect Our Wisconsin Environmental Resources (POWER), were careful to allege that some of their members were local residents and otherwise geographically proximate to the site of the plant.

may have been persuaded that the particular interests which the individual petitioner sought to protect were already represented by a public interest group that was apparently better able to present a full case. Granting the individual's petition could have placed additional burdens on the hearing process without any assurance that the outcome would be seriously affected.

The need to determine whether a particular intervenor can contribute to a proceeding as a basis for deciding whether to permit intervention will become increasingly important as additional applications for construction permits are received⁸⁷² and the average hearing time increases.⁸⁷³ Prior to the recent expansion of the Commission's jurisdiction over environmental and antitrust issues,⁸⁷⁴ relatively few persons or groups sought to intervene in construction permit proceedings.⁸⁷⁵ Only in the past few years have there been large numbers of attempted interventions.⁸⁷⁶ The legitimizing function of the mandatory hearing has also contributed to protracted proceedings.

The result of privacy at the prehearing "negotiation" stage and an air of partiality at the hearing stage has been the creation of an artificial and distrustful atmosphere for the licensing process. The interveners see the licensing hearing as stacked, and they tend to retreat to the tactic of delay rather than plotting a strategy for victory.

The problem is compounded by the advent of "public interest" groups which employ able counsel and participate fully as interveners. Substantial delays have occurred at the hearing stage in almost every case in which private citizens or

⁸⁷² In mid-1971 there were 22 operating nuclear power plants, 55 additional plants under construction, and 45 planned or ordered. The AEC estimates that there will be 950 operating plants by the end of the century. See N.Y. Times, Feb. 17, 1971, at 41, col. 6. Cf. Ellis & Johnston, *supra* note 831, at 20.

⁸⁷³ Though the AEC claims that its decisionmaking procedures "generally operate with reasonable speed considering the interests and issues" that are dealt with, RESPONSES, *supra* note 30, at 787, the hearing time has increased geometrically in the past few years. See Ellis & Johnston, *supra* note 831, at 23. The average hearing time has increased more than twenty-five fold in the past four years. *Id.* 21.

A recent example of the burden which public intervenors may impose on the administrative process is found in the Shoreham, N.Y., construction permit proceeding. Hearings were held intermittently from Sept. 21, 1970, through Nov. 1971, and AEC officials estimate that it could be at least mid-1972 before a construction permit could issue. See N.Y. Times, Nov. 4, 1971, at 94, col. 1. The Lloyd Harbor Study Group, a local conservation organization with the support of a number of national groups, contributed to the length of the proceedings by conducting extensive cross-examination of witnesses for both the AEC and the applicant. The length of the Shoreham hearings may be compared to the three or four days consumed in other similar hearings. See N.Y. Times, Jan. 24, 1971, at 44, col. 4.

⁸⁷⁴ Ellis & Johnston, *supra* note 831, at 20. See note 862 *supra* & notes 893-913 *infra* & accompanying text.

⁸⁷⁵ See note 886 *infra* & accompanying text.

⁸⁷⁶ See, e.g., Pacific Gas & Elec. Co. (Diablo Canyon Unit 2), 2 CCH ATOM. EN. L. REP. ¶11,590.01 (1970) (8 petitions to intervene); Toledo Edison Co. & Cleveland Elec. Illuminating Co. (Davis-Besse Nuclear Power Station), 2 CCH ATOM. EN. L. REP. ¶11,594.01 (1971) (6 petitions to intervene).

public interest groups have participated as parties in opposition to an application.⁸⁷⁷

There has also been a substantial increase in the number of challenged operating licenses, and delay at that point in the construction and operating process is very costly to the utility.⁸⁷⁸ It has been suggested that

[t]he proliferation of contested operating-license hearings has stemmed in part from the limited opportunity for, and the restricted statutory scope of, public participation in the construction-permit hearings. It is also due in part from intervenors being more than willing to take two bites at the apple when offered.⁸⁷⁹

The detrimental impact of such delay cannot be overemphasized.⁸⁸⁰ Concerned representatives of both industry and environmentalist groups have cited the inadequacy of AEC procedures as a major cause of the problem, suggesting not only a re-examination of public hearing procedures, but also a complete restructuring of the licensing process.⁸⁸¹

c. *Standing of Parties to Raise Particular Issues*

Public intervenors have rarely been absolutely denied the opportunity to participate in Commission hearings,⁸⁸² but intervention has been granted on the condition that issues deemed beyond its jurisdiction not be raised. Alternatively, intervention may be granted unconditionally, but the board may refuse to consider extra-jurisdictional evidence.

(i) *Challenges to the Applicant's Safety Analysis*

At the construction permit hearing the basic inquiry has been whether the nuclear facility can be safely operated.⁸⁸³ A construction

⁸⁷⁷ Ellis & Johnston, *supra* note 831, at 42-43; cf. I. Like, Multi-Media Confrontation—The Environmentalists' Strategy for a "No-Win" Agency Proceeding (1971) (advocating that public intervenors use the administrative arena as a forum to educate the public and transform agency hearings into a dramatic medium to expose environmental issues). The nuclear power industry is extremely concerned with dilatory tactics adopted by public intervenors with the purpose of imposing stricter requirements. See Statement of Myron M. Cherry on Behalf of Friends of the Earth, *Hearings on AEC Licensing Procedure & Related Legislation Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 92d Cong., 1st Sess., pt. 1, at 385, 390-91, 403-04 (1971) [hereinafter cited as Cherry Statement].

⁸⁷⁸ Ellis & Johnston, *supra* note 831, at 35; cf. Cavers, *supra* note 832, at 249.

⁸⁷⁹ Ellis & Johnston, *supra* note 831, at 35.

⁸⁸⁰ Long Island Lighting Co. estimates that continued delay in the Shoreham, N.Y., construction permit hearings "would cost a minimum of \$1-million a month." N.Y. Times, Nov. 4, 1971, at 94, col. 1. Of course, much of this cost will be passed on to the consumer.

⁸⁸¹ See, e.g., N.Y. Times, Nov. 13, 1971, at 38, col. 5 (research director for Lloyd Harbor Study Group cites inadequate hearing methods as a cause of delay at Shoreham hearings); Smith, *An Energy Threat*, N.Y. Times, Nov. 7, 1971, § 3, at 26, col. 4 (H. W. Winterson, president of the Atomic Industrial Forum, calls for a complete restructuring of licensing procedures).

⁸⁸² See notes 844-47 *supra* & accompanying text.

⁸⁸³ Green, *supra* note 835, at 640.

permit is to be issued only after the AEC considers the "health and safety of the public."⁸⁸⁴ Because of the exceedingly technical issues involved in reviewing the applicant's and the AEC staff's safety analysis⁸⁸⁵ and the "difficulty in obtaining the technical expertise to perform the type of detailed, careful study performed by the regulatory staff and by ACRS,"⁸⁸⁶ intervenors have heretofore rarely challenged reactor design. As public interest organizations become more sophisticated and better financed, the role of intervenors may be more constructive.⁸⁸⁷ Though no reactor design has ever been altered as a result of a public hearing,⁸⁸⁸ intervenors have successfully influenced applicants to withdraw applications or to reach a settlement. The intervenors in the *Bodega*⁸⁸⁹ and *Malibu*⁸⁹⁰ cases, alleging that there were undue earthquake hazards, successfully discouraged the siting of reactors near fault lines. Public intervenors have also exacted quality control concessions from the nuclear reactor industry,⁸⁹¹ resulting in industry concern with the "serious problems" of public disclosure caused by "professional dissidents."⁸⁹²

(ii) Challenges to Environmental Effects

The AEC's narrow view of its jurisdiction over nonradiological environmental matters has led to the denial of standing of intervenors

⁸⁸⁴ 42 U.S.C. § 2133(b) (1970).

⁸⁸⁵ For a layman's outline of the technical issues involved in a safety analysis, see J. HOGERTON, *ATOMIC POWER SAFETY* 20-32 (1964).

⁸⁸⁶ Ellis & Johnston, *supra* note 831, at 55-56. The cost of acquiring legal and expert aid, *see id.* 50-51, and the reluctance of qualified experts to testify against a project recommended by the AEC, *see* Like, *supra* note 877, at 11, are large obstacles faced by intervenors in safety hearings. It has been suggested that public intervenors should be provided "with access to scientific expertise and financial resources to enable the public intervenor more effectively to participate in public hearings." Cherry Statement, *supra* note 877, at 393.

⁸⁸⁷ *See* Cavers, *supra* note 832, at 253; Cherry Statement, *supra* note 877, at 398-99.

⁸⁸⁸ Ellis & Johnston, *supra* note 831, at 25.

⁸⁸⁹ The applicant withdrew its application after an adverse staff report on the suitability of the site. *See* Proposed Nuclear Power Plant at Bodega Head by Pac. Gas & Elec. Co., 2 CCH *ATOM. EN. L. REP.* § 11,261 (1964); Green, *supra* note 835, at 642 n.64; Cavers, *supra* note 832, at 247.

⁸⁹⁰ In the *Malibu* case, the hearing resulted in a conditional initial decision for the applicant. Department of Water & Power (Malibu Nuclear Plant Unit No. 1), 3 A.E.C. 122 (1966), but the board's authorization of a provisional construction permit was set aside and remanded for amendments to the application, 3 A.E.C. 179 (1967). The applicants then withdrew their application. Ellis & Johnston, *supra* note 831, at 25.

⁸⁹¹ *See* Cherry Statement, *supra* note 877, at 398-402. Cherry recounts several cases in which intervenors were able to raise safety problems constructively and to participate in settlement agreements in which the applicant made important concessions. *See, e.g.,* Palisades Plant Settlement Agreement between Intervenors and Consumers Power Co. (1971), copy on file in Biddle Law Library, Univ. of Pa. Law School.

⁸⁹² Cherry Statement, *supra* note 877, App. C, at 415. The quote is from the record of a 1970 seminar on AEC hearings conducted at Gaithersburg, Md., for the nuclear power industry. A large part of the seminar was devoted to the problems caused by intervenors and how to mitigate their impact, including the "proper maintenance" of records that may be susceptible to damaging discovery. *Id.* 402.

to raise such issues as thermal pollution and aesthetics at licensing hearings.⁸⁹³ Prior to the National Environmental Policy Act⁸⁹⁴ the AEC consistently adhered to a position that its authority did not extend to the consideration of environmental effects not directly related to problems of atomic radiation.⁸⁹⁵

In the case of *Vermont Yankee Nuclear Power Corp.*,⁸⁹⁶ the states of New Hampshire, Vermont, and Massachusetts unsuccessfully attempted to offer evidence into the hearing relating to the possible thermal pollution of the Connecticut River resulting from a proposed nuclear power plant. At the outset of the hearing, the board advised that

[q]uestions about other aspects of health and safety or other aspects of the plant not falling within the areas of radiological health and safety and the common defense and security are not within the AEC's jurisdiction and will not be considered at this hearing. Thus, *we will not consider such matters as the possible thermal effects, as opposed to the radiological effects, of the facility operation on the environment; the effect of the construction of the facility on the recreational, economic or political activities of the area near the site; or matters of aesthetics.*⁸⁹⁷

On appeal the Commission affirmed the board's exclusion of the evidence on the grounds that those issues were beyond the jurisdiction of the board and that the Commission's rules of procedure prohibited their consideration.⁸⁹⁸ The Commission also noted that the admission of such evidence would constitute a change or enlargement of the issues specified in the notice of hearing and thus would breach the condition under which the states had been permitted to intervene.⁸⁹⁹ The states appealed the grant of the construction permit, alleging as error the

⁸⁹³ See, e.g., *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524 (D.C. Cir. 1970); *Consolidated Edison, Inc. (Indian Point Nuclear Generating Unit 3)*, 2 CCH ATOM. EN. L. REP. ¶ 11,579.01 (1969).

The recently expanded jurisdiction of the AEC to hear antitrust complaints, see note 862 *supra*, will not be discussed.

⁸⁹⁴ 42 U.S.C. §§ 4321-47 (1970).

⁸⁹⁵ See *New Hampshire v. AEC*, 406 F.2d 170 (1st Cir.), cert. denied, 395 U.S. 962 (1969). See also letter from Glenn T. Seaborg to Senator Muskie, Nov. 4, 1967, in *Hearings on Licensing & Regulation of Nuclear Reactors Before the Joint Comm. on Atomic Energy*, 90th Cong., 1st Sess. 980 (1967).

The Commission interpreted its mandate to issue a license only when it is not "inimical . . . to the health and safety of the public," 42 U.S.C. §§ 2133(d), 2134(d) (1970), to refer only to dangers arising from the hazards of radioactivity. See letter from Harold L. Price, AEC Director of Regulation, to Senator Muskie, Oct. 23, 1967, in *Hearings on Licensing & Regulation of Nuclear Reactors Before the Joint Comm. on Atomic Energy*, 90th Cong., 1st Sess. 977 (1967). See also Note, *supra* note 828, at 764-65.

⁸⁹⁶ 2 CCH ATOM. EN. L. REP. ¶ 11,267.02, at 17,503 (1967).

⁸⁹⁷ *Id.* at ¶ 11,267.04, at 17,503-5 n.2.

⁸⁹⁸ *Id.* at ¶ 11,267.03, at 17,503-5.

⁸⁹⁹ *Id.*

Commission's refusal to consider evidence of thermal pollution. The court thoroughly analyzed the legislative history of the Atomic Energy Act and concluded that the Commission's responsibility was limited to "scrutiny of and protection against hazards from radiation."⁹⁰⁰

The NEPA has changed this situation, declaring "a national policy which will encourage productive and enjoyable harmony between man and his environment [and] promote efforts which will prevent or eliminate damage to the environment" ⁹⁰¹ All federal agencies are directed, "to the fullest extent possible," to

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁹⁰²

Despite the NEPA's sweeping language, the AEC moved slowly in adopting regulations to conform to its mandate.⁹⁰³ Though the promulgated rules did provide that intervenors would be permitted to raise environmental issues at construction permit hearings,⁹⁰⁴ the Commission's implementation of the NEPA limited the scope of environmental issues that may be considered in the decisionmaking process.⁹⁰⁵

The opinion of the Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee v. AEC*⁹⁰⁶ severely criticized the AEC's minimal response to the NEPA. The petitioners in *Calvert Cliffs* challenged the AEC's rules ostensibly effectuating the NEPA, alleging that the rules limited full consideration and balancing

⁹⁰⁰ *New Hampshire v. AEC*, 406 F.2d 170, 175 (1st Cir.), cert. denied, 395 U.S. 962 (1969).

⁹⁰¹ 42 U.S.C. § 4321 (1970).

⁹⁰² 42 U.S.C. § 4332(2)(c) (1970).

⁹⁰³ NEPA went into effect on Jan. 1, 1970, but a formal change in the AEC rules implementing NEPA was not announced until Dec. 3, 1970. See *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1116 (D.C. Cir. 1971).

⁹⁰⁴ See 35 Fed. Reg. 18,474, ¶ 11(a) (1970).

⁹⁰⁵ *Ellis & Johnston, supra* note 831, at 27; Like, *supra* note 877, at 18.

⁹⁰⁶ 449 F.2d 1109 (D.C. Cir. 1971).

of environmental values. The petitioners specifically attacked provisions providing that hearing boards need not consider the environmental impact of a licensed reactor unless that issue is affirmatively raised by a party,⁹⁰⁷ and that boards are prohibited from conducting an independent evaluation of environmental factors if other federal or state agencies have certified that their standards are satisfied.⁹⁰⁸ The court remanded the case, directing that "the Commission must revise its rules governing consideration of environmental issues."⁹⁰⁹ The court made it clear that the Commission may not permit licensing boards to adopt the option of admitting evidence concerning nonradiological effects only to ignore it in the decisionmaking process:

NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual. Clearly, it is pointless to "consider" environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings.⁹¹⁰

The Commission has revised its rules consistent with the opinion.⁹¹¹ *Calvert Cliffs* has informed the AEC that the NEPA requires a substantive change in the Commission's narrow interpretation of the "health and safety of the public." Both the expanded jurisdiction and the justification for it given in *Calvert Cliffs* have been criticized on the grounds that jurisdiction over environmental impact is already vested in other bodies and that AEC consideration is thus redundant as well as of little potential benefit in view of the AEC's exhibited biases.⁹¹² This redefinition of the Commission's statutory licensing responsibilities will, however, provide public intervenors an opportunity to raise a broad spectrum of environmental issues at construction permit

⁹⁰⁷ See 35 Fed. Reg. 18,474, § 13 (1970).

⁹⁰⁸ See *id.* § 11(b); cf. Ellis & Johnston, *supra* note 831, at 27-28. The complaint also attacked the regulations which prohibited the raising of nonradiological issues in cases where the notice for the hearing appeared before Mar. 4, 1971, 35 Fed. Reg. 18,474, § 11(a) (1970), and which stated that, for any construction permit issued prior to that date, the Commission would not formally consider environmental factors until the time for issuance of an operating license, *id.* § 14.

⁹⁰⁹ 449 F.2d at 1129.

⁹¹⁰ *Id.* at 1128 (emphasis in the original).

Consumers Power Co. of Jackson, Mich., has filed a petition for a rehearing of *Calvert Cliffs*, stating that the new AEC regulations make the situation "particularly acute" for its Palisades plant. 2 [Current Developments] BNA ENV. REP. 548 (Sept. 10, 1971).

⁹¹¹ 10 C.F.R. § 50, App. D (1972).

⁹¹² Tarlock, Tippy & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502, 534-38 (1972).

hearings, and this expanded jurisdictional base will undoubtedly have a significant impact upon the number of parties seeking to intervene and upon the time consumed by the hearing.⁹¹³

d. Conclusion

The standing of a party to raise particular issues is strongly influenced by the AEC's definition of its limited jurisdictional authority. While the public has long been allowed to speak to safety problems during the construction permit hearing, its effectiveness has been limited by a lack of technical expertise and by the fact that the hearing is no more than a public corroboration of the regulatory staff's review of an application. With the advent of "the new breed of intervenors"⁹¹⁴ and the NEPA, the public will have a larger role in assuring that both safety and environmental considerations will be fully deliberated.

The AEC has only recently been faced with the administrative problems accompanying hearings with large numbers of intervening parties. The broadening of the Commission's decisionmaking responsibilities and the anticipated increase in license applications are likely to demand procedures to insure that hearings are conducted in an orderly fashion. The adoption of rules providing boards with guidance in dealing with the problems of multiple intervenors and of limited appearances has already been suggested.⁹¹⁵ When acting on a petition to intervene or when determining whether to admit evidence on a particular issue, boards should look not only to whether the intervenor alleges interests which may be affected by the proceeding but also to what the petitioner will contribute; if permitted to participate fully in the hearing.⁹¹⁶ Perhaps more important to the efficient conduct of future AEC hearings is the promulgation of more definite standards expressing Commission policy on recurring issues.⁹¹⁷ Setting forth such rules once, through the

⁹¹³ Ellis & Johnston, *supra* note 831, at 26-28. The real impact of the *Calvert Cliffs* decision upon the status of intervenors has already been demonstrated. The AEC, in authorizing a public hearing on the grant of an operating license for the Maine Yankee Atomic Power Plant, reversed its prior position and granted previously-rejected petitions to intervene by three conservation groups. See N.Y. Times, Nov. 14, 1971, at 24, col. 1.

⁹¹⁴ Cherry Statement, *supra* note 877, at 387.

⁹¹⁵ See notes 853-57 *supra* and accompanying text.

⁹¹⁶ See Ellis & Johnston, *supra* note 831, at 54 ("Intervention should be restricted to those who have shown any interest in the case which will not otherwise be represented by any other party and which is related to the limited issues raised by answers to [an] order to show cause.").

⁹¹⁷ *Id.* 45-46, 66. This technique has been successfully utilized; the Commission has passed a rule stating that an application for a construction permit need not provide design features for the purpose of protecting a facility against enemy attack and sabotage. See 10 C.F.R. § 50.13 (1972). This rule may be used by a licensing board as grounds for denying an intervenor the opportunity to cross-examine an applicant on the attack and sabotage issues. See *Siegal v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

Several commentators have suggested that AEC proceedings could be expedited by providing a public licensing hearing only in contested cases where the prospective intervenor has "shown cause." Ellis & Johnston, *supra* note 831, at 47-57.

rulemaking process, rather than repeatedly in adjudicative-permit proceedings, would allow public protestants to participate more effectively in the establishment of licensing criteria and would expedite individual licensing cases.

3. Proposals to Unify Power Plant License Decisionmaking

From such cases as *Scenic Hudson* and *Calvert Cliffs*, it is apparent that an ad hoc approach to power plant licensing prevails in both the FPC and the AEC. Criticism of such an approach, and its tendency to produce decisions that disregard the overall balance of costs and benefits to society, may be viewed as an issue wholly distinct from the issue of the proper role and scope of public participation in agency decisions. Either an ad hoc or an integrated decisionmaking process could, for example, proceed by totally excluding the public or by providing limited opportunity for comment on formal decisions. Indeed, one may imagine that there exist groups representing particular segments of the public that would benefit in particular cases by retention of ad hoc decisionmaking—the most obvious example being an association of politically influential local property owners opposing construction of a facility that would face less opposition if placed in an area more densely populated but less influential or more disorganized.

Despite these possibly ambivalent results of the integration of decisionmaking, those who favor increased public participation in power plant siting decisions have advocated this reform with at least as much vigor as have members of the industry⁹¹⁸ and the agencies.⁹¹⁹ For example, Judge Irving Kaufman, a veteran of the litigation surrounding the licensing of the Storm King Mountain power plant, has strongly suggested such integration because he sees it as a cure for the problems confronting public participants and the problems they, at least in part, have in turn precipitated:

Specifically, I submit that, because of the absence of an agency with a broad perspective and broad planning authority, the ultimate decision whether to license the Storm King plant and other electric power plants is unreasonably delayed and public participation in the decision unduly restricted, however open the proceedings may be theoretically.⁹²⁰

This view suggests that the scope of public discussion before an agency depends on the scope of the agency's responsibility as well as the legislative standards set for the agency's action. Concerning *Scenic Hudson*, Judge Kaufman observed:

⁹¹⁸ See, e.g., Lowenstein, *The Need for Separation of the AEC's Functions*, 13 *ATOM. EN. L.J.* 282 (1971).

⁹¹⁹ See Nassikas, *supra* note 742.

⁹²⁰ Kaufman, *Power for the People—and by the People: Utilities, the Environment and the Public Interest*, 46 *N.Y.U.L. REV.* 867, 873 (1971).

The basic defect in the process, as I see it, was the inevitably narrow scope of the decision the agency had to make: whether or not to license a single and specific electric generating plant. The narrow scope of the decision before the agency led necessarily to a strictly limited discussion of the issues by the public. Questions of other possible sites or of a planned dispersal of power plants and the like could not be discussed by public interest groups because these issues were not before the agency.⁹²¹

The FPC is now required to approve only power facilities that comport with a "comprehensive plan." Apparently recognizing that such a term is too broad to be very useful, the court in *Scenic Hudson* looked to the more specific statutory language following the term in order to find a responsibility in the agency to consider "recreational" uses.⁹²² By comparison the AEC, which certifies facilities already subject to regulation by the FPC,⁹²³ is charged with regulating to serve the public interest. These broad standards for agency action are practically meaningless where "regulation is sadly fragmented between various levels of government."⁹²⁴ The passage of the NEPA with its particular substantive values, and the *Calvert Cliffs* litigation following that enactment, demonstrate convincingly the muddled, compartmentalized concept of regulatory responsibility that has resulted in the power industry. Lapses in regulation are virtually certain to result as a consequence of each agency's decision that certain foreseeable costs of a siting decision should be disregarded because not relevant to that agency's "limited" area of responsibility.⁹²⁵

Proposals for restructuring the regulation of the electric power industry now commonly focus on balancing the two needs about which debate has recently centered: environmental protection and power needs. One bill which the Nixon administration has presented to Congress in response to calls for restructuring does not attempt to unify regulation fully, but it moves in that direction by consolidating federal regulation and subjecting state regulation to federal oversight.⁹²⁶ At the same time, the bill would establish more meaningful—and perhaps enforceable—standards for agency action, by charging the federal authority to ascertain that a proposed facility "will not unduly impair important environmental values and will be reasonably necessary to meet electric power needs."⁹²⁷ Although these terms conceal myriad costs and bene-

⁹²¹ *Id.* 872.

⁹²² 354 F.2d at 614.

⁹²³ See note 722 *supra* & accompanying text.

⁹²⁴ Tarlock, Tippy & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502, 505 (1972).

⁹²⁵ See notes 767, 882-913 *supra* & accompanying text.

⁹²⁶ H.R. 5277, 92d Cong., 1st Sess. (1971).

⁹²⁷ *Id.* § 8(c).

fits, their use nonetheless suggests a limited regulatory perspective under the unified control established. In view of the general unwillingness of the FPC and AEC to broaden their perspectives when pressured by members of the public,⁹²⁸ the use of terms more specific than "public interest" may make even less likely agency response to new concerns when now-silent members of the public appear to champion them.

Within the context of reforms directed at consolidation of regulation for the purpose of balancing a limited number of goals, the nature of public participation remains a problem. One recent article⁹²⁹ has examined a one-step licensing procedure adopted in 1970 in the state of Washington and has made an observation that applies to public participation as well as to the regulation focused upon:

The Washington experience indicates that one-stop licensing can be either a means of preventing delays in plant construction, or a means of shielding utilities from regulation by agencies that have a statutory mandate to improve environmental quality.⁹³⁰

Unified regulation is a means of streamlining decisionmaking, not a means of making that regulation more open or more careful. Seen from this perspective, Judge Kaufman's proposal is but a *sine qua non* to effective public participation, not a way of ensuring it. Indeed, the Chairman of the Federal Power Commission has discussed the proposal in terms suggesting that it would reduce at least some, potentially harmful, dimensions of public participation:

[T]here is the question of just how many times general public participation is to be allowed in respect to the location of specific utility facilities. Those who are close followers of legislative siting proposals before the Congress and various state legislatures, will recognize that I am referring to the one-stop problem.⁹³¹

Unifying the regulation of the power industry, then, is not a panacea for the frustrated public that wishes to participate. It should be, however, the occasion for a reexamination of the proper role of the public participant, if for no other reason than the fact that the restructuring will necessarily settle the issues. The number of specific proposals recently put forward and the fluidity of the current situation precludes detailed examination in the space available here. Certain conclusions drawn from the discussions of the FPC and the AEC above should be re-emphasized here, though, for they lend support to some of the programs proposed. Participation by the public as full parties in multiple,

⁹²⁸ See notes 767, 882-913 *supra* & accompanying text.

⁹²⁹ Tarlock, Tippy & Francis, *supra* note 912.

⁹³⁰ *Id.* 555.

⁹³¹ Nassikas, *supra* note 742, at 113.

formal power plant licensing hearings has been a conspicuously defective device for implementing the full, open debate called for by this Comment. Consolidation in one proceeding of particular and general questions concerning both technology and policy has made participation an enormous undertaking, and has thus effectively foreclosed all but a few strongly motivated and well financed members of the public. Putting the burden on the parties to back normative arguments with technological data showing feasibility has only increased this problem. Public participation should not mean participation by a few interest groups outside the regulated industry, and reform ought to focus sharply on eliminating these problems. Combined with a conscious articulation of the scope of a unified agency's regulatory responsibility that provides channels for easy entry of emerging groups of concerned individuals, this provision for more effective but limited participation will go far toward improving the decisionmaking process.

FPC Chairman Nassikas, while supporting broad public participation, has advocated reforms that may actually foreclose the public from formal hearings completely. He has suggested that there be substituted an earlier and ongoing process of opinion and information gathering, which, without further details, is called a "collaborative analytic process."⁹³² While it is easy to agree that full participation in formal hearings has been unsatisfactory in the regulated power industry, suggestions that decisions should be "collaborative" must be viewed with scepticism, for they may be no more than a call for a return to captive regulation. A more promising possibility has been advanced by Professor Jerre Williams of the University of Texas.⁹³³ Public participation would be accomplished through a bifurcated hearing structure and the creation of a public counsel. One hearing would be "advisory," conducted informally and open to any interested person or group; the other would be similar to the licensing hearing now in use, and the public would be represented as a full party by the public counsel. Backed by a requirement that written submissions be freely accepted from the public in both proceedings and included in a record available for purposes of review, this structure is at least a step in the right direction. Perhaps supplemented by a requirement that the public counsel participate in the informal hearing, this would guarantee competent representation of the public in the formal decisionmaking process while offering significant hope that the public counsel thus appearing will not himself become a captive of the institution and its views. While the informal hearing should be the primary forum for wideranging debate, an outside voice in the formal proceeding should be retained in order both to allow rebuttal on issues raised by the parties to the formal proceeding and to hold open a door to effective judicial review.

⁹³² *Id.* 112.

⁹³³ Williams, *Public Participation in Locating Facilities Dedicated to Public Use*, 88 PUB. UTIL. FORT., Sept. 16, 1971, at 101 (1971).

III. CONCLUSION

Public participation in federal agency decisionmaking is not, of course, an end in itself. Rather it is only one means to insure that regulation in fact furthers the "public interest." As noted in the first section of this Comment, one of the most frequent criticisms directed at the federal agencies is that they favor and too often accommodate the desires and ends of the regulated industries. Attacks on the decisionmaking process are now loudest from currently "unrepresented" groups—consumers and conservationists predominating.

The problem goes deeper, however. If the response to these criticisms is no more than an adjustment admitting the most organized and well financed groups to a position of influence, it is doubtful that the decisionmaking process will have been fundamentally improved. As this Comment has noted, courts have taken numerous steps within the confines of existing statutory schemes to open agency decisionmaking to fuller debate and closer judicial scrutiny. But in taking these steps, courts have favored "responsible" participants or group representatives without exploring the implications of such restrictions for agency policy evolution.

Where the channels for public participation in agency decisionmaking are adversary hearings and judicial review, one consequence is that the costs of private litigation impose significant restraints. Another consequence is that essentially political decisions are made not by the agencies, but by courts relying as best they can on the vague statutory standards established for regulatory action.

Statutory reform with the goal of emphasizing other channels for public participation may be the most desirable direction in which to move. The prior failure of the agencies to make greater use of rule-making may be a primary cause of current problems. If the agencies will not voluntarily engage in open, broadly debated, formalized policy formulation, statutory measures to force them to take these steps are appropriate. Where such measures have been enacted, judicial review could be limited to cases where individual hardships appear.

As this Comment has detailed, however, much can be done within existing statutory frameworks. Public participation generally is, and should be, promoted where the agency is making choices based on essentially political rather than technological grounds. In the areas subject to FCC regulation, where the technological framework has become relatively stable, both the public and the courts have readily entered individual controversies. On the other hand, every decision by the FPC or AEC to license a power plant involves complicated technological judgments, hardly susceptible to the type of debate possible within FCC proceedings. Nevertheless, sharper delineation of the political choices made by these agencies is clearly possible and frequently suggested. Recognizing the practical constraints on maintaining full

party status in agency adjudications, flexible techniques for limited participation should be increasingly developed. At the same time courts, agencies, and legislatures should seek ways to minimize the economic burden placed on members of the public who seek to put relevant information before the agency and prod agency action in the public interest.

UNIVERSITY OF SOUTHERN CALIFORNIA,
Los Angeles, Calif., March 13, 1973.

MELDON E. LEVINE,
*Legislative Assistant to Senator Tunney, U.S. Senate, Committee on the Judiciary,
Washington, D.C.*

DEAR MR. LEVINE: I have carefully reviewed the provisions of S. 4014 as you requested and offer these sketchy comments on the bill for what value they may be to you and Senator Tunney.

I am pleased to offer my support of this bill which provides, in my judgment, an appropriate and necessary step in the direction of broad antitrust reform. At a time when our antitrust laws are under increasingly severe attack from the left (see, e.g., Galbraith, *The New Industrial State*) as well as from the right (see, e.g., Althian and Allen, *Exchange and Production, Theory in Use*) and when public confidence in those laws is probably at an all-time low, these relatively non-controversial changes should be welcomed by the Congress and swiftly enacted. The need which generated these proposals and their objectives are succinctly put forth in the statements of Senators Tunney and Gurney. I concur fully with those statements.

I do not believe that there can be serious opposition to either the requirement of preparation and publication of the public impact statement or the procedures for public comment and Department response. If this proposal is followed by the Department in the spirit in which it is intended, it should have a salutary effect in dispelling the widely-held view that political influence can win privately what could not be achieved publicly. At first glance, I was concerned that perhaps this proposal would eventually degenerate, in practice, into a pro-forma bureaucratic exercise of added paper work that would be worthless, burdensome and expensive. I was also initially concerned that the requirement would prove so distasteful that it could drive the Department further underground, through the adoption of policies whereby the bulk of its work would be done informally before the filing of a complaint. I now believe that both fears are unwarranted. The burden to the Department should surely prove insignificant in relation to the healthy result of greater public access and scrutiny. The bulk of the work necessary to the preparation of such a statement will by necessity have been completed before the filing of a complaint.

Similarly, the requirement that the court play an active role in the settlement process seems to me a healthy improvement over present practice. I had the reaction on first examination of this proposal that there was, perhaps, too much discretion given to the trial judge in the fashion in which he is to make the required determination. It would be unfortunate if, as a result of this proposal a third dispositional layer were added to the process. That fear, I believe on reflection, is also unwarranted. There is simply no need in the vast majority of cases for lengthy, complicated hearings and there is no reason to suppose that they will be required by the courts unless a real need is present.

I feel rather strongly, however, that the new penalty provision is still not adequate. While certainly a vast improvement over present law. I would be much happier to see penalties commensurate with the damage done to the public and related to the financial status of the offender. Too often the provided penalties are considered by business men as simply an economical cost of doing business.

The proposed amendments to the Expediting Act are likewise welcome and sound adjustments to present practice. Certainly a substantial majority of the Court will applaud this change. My only reservation is that, particularly in private suits, the certification process will simply add further expense and delay to the plaintiff's prosecution of his claim. If a denial of the motion to certify is not appealable, however, the benefits of this proposal far outweigh that danger. As presently structured, the bill has the advantage of providing a realistic avenue of appeal in antitrust cases without the danger of lengthy delays in cases that warrant the immediate attention of the high Court.

Sincerely yours,

DONALD C. KNUTSON,
Professor of Law.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., March 28, 1973.

Hon. JOHN V. TUNNEY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR TUNNEY: As you know, a few weeks ago I sent to Mr. Levine at his request some informal notes that I had prepared concerning S. 4014 (now S. 782) insofar as it dealt with the revision of current consent decree procedures. In those notes, I expressed deep reservations concerning the wisdom of the proposed revisions. I still adhere to those views, but having had the benefit of reading some of the statements submitted in your recent hearings, and having thought further about the matter, it seems to me that the principal problem with which you have been concerned, and properly so, can be met with a more narrowly circumscribed bill than the one proposed.

Accordingly, I am enclosing herewith a draft of substitute provisions which would, I believe, meet the problem that you and others are concerned with, without the excessive costs that in my opinion S. 782 would involve. The general propositions lying behind my suggestions are as follows:

1. The principal concern is that the decisions of the Department of Justice to enter into particular consent decrees reflect a careful consideration of all of the relevant factors, and that they not be affected by undue political or other influence exerted by defendants. Almost invariably, the possibility that inadequate consideration or undue influence may have occurred, and the need or desirability of a public explanation of the reasons for the decision, will arise in cases where the proposed consent judgment departs in major respects from the relief requested in the complaint or the relief which would be normally appropriate for the antitrust violations alleged. Where the relief approximates what has been requested or what is normally obtained after an adjudication of violations, it is of course conceivable that the Department was not sufficiently attentive to the needs of the case or was subjected to undue influence, but it is vastly more likely that any minor claimed deficiencies will simply reflect the fact that the Department could not obtain the defendant's consent to the maximum relief that would be obtainable after a full and successful trial. And in any event, so long as the relief is equal or close to what is normally obtained, there is little or no public interest at stake in any prolonged inquiry.

2. As Mr. Campbell's prepared statement seems to suggest, it seems quite clear to me that the Federal district courts presently have ample powers to conduct whatever inquiry is necessary to determine whether or not a proposed consent judgment is in the public interest. Accordingly, I do not believe there is any need for new legislative specification of procedures and powers, and I remain deeply concerned that the proposed revisions—principally by encouraging third-party intervention but in other respects as well—would impose unnecessary burdens and may even be damaging to the effectiveness of consent decrees.

3. Elaborating on the previous point, I do not believe that any new procedural provisions are necessary in order to insure appropriate consideration of the interests of third parties. It is of course obvious, as Mr. Campbell pointed out in his statement, "that the injunctive and divestiture provisions of the consent decree can substantially affect the economic interests of suppliers, customers, competitors and even employees of the consenting defendants." But I cannot agree with Mr. Campbell's broad formulation that "accordingly these interests should properly be considered by the court in considering whether a proposed decree is in the public interest," if there is any hint or suggestion in it that the court, in order to mitigate losses to third-party private interests, may properly propose a modification of a proposed decree that would weaken it from a competitive standpoint. The overriding criterion for the "public interest" in an antitrust decree is whether it eliminates the anticompetitive consequences of the alleged violations. And even if a proposed decree provision is irrelevant to antitrust considerations, it is not clear to me that a consent decree proceeding is the appropriate place to thrash out such disputes.

4. I agree with Mr. Kauper's and Mr. Hammond's suggestion that proposed subsection (f) be modified to exclude from its scope communications with any official or employee of the Department of Justice.

Lest there be any doubt, let me say that I strongly support those parts of S. 782 dealing with criminal fines and the Expediting Act. If anything, I would raise the maximum corporate fine to at least \$1 million. Contrary to the position taken by the New York City Bar Association, which prefers simple repeal of the Expediting Act, I believe that bill's provisions for direct appeal in special cases are of critical importance.

Sincerely,

DONALD F. TURNER.

Enclosure.

PROPOSED REVISION OF S. 782 ON CONSENT DECREE PROCEDURES

(b) Any consent judgment proposed by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which that proceeding is pending and published in the Federal Register at least 60 days prior to the effective date of such decree; *provided*, however, that on a showing that extraordinary circumstances so require, the district court may enter the decree at any time after the filing of the proposed decree.

(c) In any case in which the relief provided for in a proposed consent judgment deviates in major respects from that sought in the complaint [or is substantially less than the minimum relief which under established principles of law would normally be deemed appropriate for the violations alleged in the complaint] or in any case in which the district court shall so order, the United States shall file with the district court, cause to be published in the Federal Register, and thereafter furnish to any person upon request a statement which shall recite the reasons why the United States believes that entry of the proposed consent judgment to be in the public interest, including in particular the reasons why the proposed consent judgment is more in the public interest than a dismissal of the complaint without prejudice.

(d) The provision of subsection (c) shall not be construed to require the United States publicly to disclose material otherwise legally privileged.

(e) Not later than 10 days following the filing of any proposed consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any officer, director, employee, or agent thereof, or other person except counsel of record, with any officer or employee of the United States, other than an officer or employee of the Department of Justice, concerning or relevant to the proposed consent judgment.

Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this section have been complied with and that such filing is a true and complete description of such communications.

(f) [Subsection (g) of the bill.]

EXPLANATORY COMMENTS

1. Subsection (b) consists of the first sentence of subsection (b) in S. 782 (with the words "or criminal" deleted), plus a proviso substantially paralleling a similar provision in subsection (c) of the bill. The procedures set forth in S. 782, and in my suggested revision, are clearly directed to civil cases, and are either unnecessary or unsuited to criminal proceedings. There is really no such thing as a "proposed consent judgment" in a criminal action, unless the Government's acquiescence in a *nolo* plea might be so characterized. The courts typically impose the sentences they deem appropriate, and the Government's role, as I recall, is limited at most to making recommendations. Also, as I recall, the Government as a matter of course will state its reasons for any recommendations, making reference to such matters as degree of culpability, age and health, and financial situation.

2. I am not certain whether the bracketed language in the proposed subsection (c) should be included. It is suggested in order to cover cases in which the complaints do not specify the requested relief with a sufficient degree of particularity. On the other hand, the language is imprecise, perhaps necessarily so, and thus might produce a great deal of dispute and uncertainty; and most complaints are fairly specific as to relief requested. Hence, my inclination would be to leave

it out. The phrase "or in any case in which the district court shall so order" is inserted to eliminate any negative implication that a district court would be deprived of the power which it now possesses to ask the Government to explain its reasons for the decree in any case in which it believes such explanation is appropriate.

3. Proposed subsection (d) may be too broadly worded, but some such provision appears to me to be necessary to protect sensitive information in, say, the foreign affairs area. The provision is worded so as to protect solely against *public* disclosure, not against disclosure to the court, which would of course retain any existing power to determine whether the matter in question is indeed of a privileged nature.

4. Subsection (e) is the same as subsection (f) of S. 782, but modified to exclude communications with officers or employees of the Department of Justice.

COMPUTER INDUSTRIAL ASSOCIATION,
Encino, Calif., April 5, 1973.

STATEMENT OF THE COMPUTER INDUSTRY ASSOCIATION ON BILL S. 782, "ANTITRUST PROCEDURES AND PENALTIES ACT"

STATEMENT OF COMPUTER INDUSTRY ASSOCIATION

The Computer Industry Association appreciates the opportunity to submit comments to the Subcommittee on the provisions of S. 782 which deals with Department of Justice consent decrees. These provisions touch upon a topic of major interest to the people and enterprises in the computer industry. While the interest of the body public as a whole may be less sharply focused in the eyes of many of its members, we believe the over-all interest in the country in the proper disposition of consent decrees is very substantial.

Let us, at the outset, be relatively specific about why many companies in the computer industry think antitrust consent decrees are important. The computer industry is dominated by one firm. That firm has been made subject to two consecutive consent decrees over a 40-year period, one in 1937 and one in 1956. The 1956 consent decree was rather extensive. It has probably facilitated the founding and initial growth of a number of computer hardware and computer service companies. However, 17 years after the entry of the decree we can see that the decree has not removed the dominance of the leading firm in business data processing, or, as the core of this function is often now described, general purpose digital computer systems manufacture and sale. The basic industry structure remains—one giant, several dwarfs, and numerous smaller entities. Major inhibitions on the growth of smaller firms still exist. By our count, 13 private treble damage antitrust actions have been instituted in recent years challenging alleged monopolistic tactics of the dominant firm. The Government has found it necessary to institute a third major antitrust action against the company bound by the prior two decrees. To put the situation in modest terms, after two consent decrees, a major unresolved problem lingers in this industry.

The Antitrust Division now seeks a division of the dominant firm into several competing entities. Were this or another resolution of the case embodied in a third consent decree, that decree would do much to shape the basic architecture of the computer business for decades to come; the number and disposition of companies in it; the terms upon which sales were made; the opportunities for entry and growth; and, in some significant degree, the nature and uses of the products the industry evolves.

So we see the matter as members of the computer industry. We can also see how the effectiveness of antitrust law enforcement in our industry can affect the over-all economy. The computer industry is one of this country's fastest growing business sectors. Today producers in the computer industry, broadly defined, receive an estimated \$13 billion in revenues annually, and users of computer equipment and services may spend a comparable amount within their own establishments. Computers, together with communications facilities, are assuming a role in the economy analogous to that of the nervous system in the human body. Computers keep track of business records, personal records, patients in hospitals, chemical plant operations and the progress of space flights.

The business often seems glamorous and exciting. We should also be aware that the industry seems increasingly to be a basic requirement for a highly

productive, highly integrated, complex economy with a high rate of economic activity.

The computer industry uses American labor skills in a way producing a high added value. It contributes over a billion dollars to our international balance of payments. And it helps significantly in the unceasing struggle to achieve the efficiency and progressiveness in our domestic economy which determines our welfare and constitutes the base for our participation in international markets.

In sum, if the current Justice Department suit is concluded in a way which improves, over time, the performance of the computer industry, then, we believe, both the nation as a whole and participants in the industry will gain in significant measure. If the suit changes things very little, then public and private funds will have been wasted, and our own hopes and national potentials for enterprise and reward will remain unrealized.

Thus, as one association in one industry we have been made acutely aware of the importance of the consent decree process. We are also aware that the consent decree process is used to settle the majority of Justice Department cases in the majority of the industries in the country, and thus has a similar importance in at least some other industries.

We understand the consent decree provisions of S. 782 to be intended to add a degree of public scrutiny and public accountability to the procedure settling government cases by agreement between the Government and the defendant. We think this a desirable objective. Given the importance of antitrust enforcement, significant improvement in any major feature is worth striving for. The attached memorandum, prepared in consultation with counsel, is submitted in hopes of assisting the subcommittee in some measure in its effort.

We would like to make clear that our suggestions concerning possible ways to improve consent decree administration are not intended to reflect adversely upon the intentions or capacities of the Antitrust Division leadership or staff. We believe the leadership and staff of the Division are characterized by a high level of dedication and diligence. The Division serves a unique and vital role in keeping our free enterprise economy competitive and efficient. The Division's orientation toward efficient markets and its methods of achieving them constitute a form of trade regulation superior to many others. We believe the subcommittee should heed Mr. Kauper's concern that the consent settlement process not be made so litigious that advantages of flexibility, expedition, and efficient use of manpower are lost.

The 1956 consent decree which affects the computer industry has never been cited as a "sell-out" decree, or as a horrible example of breakdown in the settlement process. We do not suggest that the current suit should be settled by consent decree, under either current or revised procedures. Given the failure of two consent decrees to create competitive conditions in the industry, it is possible that a solution to which the parties can agree will not solve that problem, and the necessary steps can be taken only by a court order based on a full trial.

We simply face a few facts: the 1956 decree did not achieve the basic goals of the Justice Department suit, as the economy evolved; consent decrees are important instruments of antitrust enforcement in this and other industries; as one witness, Mr. Worth Rowley, observed, there are few "regularized and effective checks" governing consent decrees; and if this important process can be improved all those who participate in the economic life of this country may gain, over time.

Finally, we can understand how an agency with resources as limited as that provided the Antitrust Division would be somewhat concerned about any set of requirements, however well intentioned, that impose a significant new workload on it. As this committee may know, the Division's budget for policing the antitrust laws across the entire economy is on the order of only \$11-12 million a year. Numerous agencies with much more limited mandates receive multiples of this kind of funding. In our view, the answer to concern about additional workload lies in part in increasing the resources given to the Antitrust Division. The Association has expressed this view to the Office of Management and Budget. And we would make the point to you. Let us be concerned about efficiency and economy in the judicial process, and in law enforcement. Let us also take the time and money to do a thorough and effective job in major cases where the economic stakes for the nation run into the billions of dollars. To do otherwise is to be penny wise and pound foolish.

Thank you again for the opportunity to make whatever contribution we might to your undertaking.

Dr. TURNER. Could I just make one further comment, now that you have mentioned it?

Is this Mr. Buxbaum's article that appeared in the California Law Review a while back?

Senator TUNNEY. Yes, that is one of them.

Dr. TURNER. Let me just state for the record——

Senator TUNNEY. Pardon?

Dr. TURNER. Let me just state for the record that I disagree with his thesis.

Senator TUNNEY. You disagree with his thesis?

Dr. TURNER. Yes, and I would just make a very brief comment as to one of the reasons why.

As I recall—I have not seen his article in quite some time—as I recall, one of the major arguments he made was that of analogizing what the Antitrust Division does to the role of an administrative agency.

His argument was the whole tendency, with regard to administrative agencies, is to broaden standing to sue and broaden rights of intervention; and, therefore, you ought to do the same thing with regard to the Department of Justice's proceedings.

I would say two things about that: One, it is not at all clear to me that the substance and performance of administrative agencies has been improved by the widespread broadening of intervention. I think that is an issue that deserves some very careful study.

But even assuming that it is, the analogy is not a good analogy. The typical administrative agency, the ICC, the CAB, the FCC, the FTC, are by statute either explicitly or implicitly directed to take into account, in determining where the public interest lies, a whole range of interests, most of them conflicting. That is one of the peculiarities of the typical administrative agency's job. It has to resolve conflicting interests.

That is not antitrust law. The Supreme Court has said repeatedly, over and over again, the antitrust law has its own standard of the public interest; namely, the preservation and promotion of competition.

The Court has said over and over again that even if private interests are severely harmed by the outcome of an antitrust case, by the decree in the antitrust case, that that must give way to the paramount concern of preservation of competition.

In the *duPont-GM* case, where duPont persuaded the district court it should not be required to fully divest its stock interest in General Motors because of alleged adverse effects on the market and the like, the Court said, "Look, we might listen to arguments of that kind if there are alternative forms of relief equally effective in preserving competition. But that argument is irrelevant if, in order to meet it, you have to decrease the effectiveness of the decree."

So this is another one of the concerns that I have about encouraging widespread intervention in antitrust cases, that there will be lots of private interests coming in who want the decree modified, not to make it more effective, but to preserve them from harm.

You would, of course, hope that the courts would not pay too much attention to that. But there is an almost inevitable tendency—you

know, when you get a lot of people who claim they are going to be hurt—to try to mollify their interests to some extent.

But the short of it is that I just do not think the analogy between the enforcement of the antitrust laws and what goes on in administrative agencies is a good one.

Senator TUNNEY. Well, that article was one of the attachments. He does have a letter which is specifically focused on the legislation itself, similar to yours.

I would just like to conclude by saying that I am very interested by what you have had to say. I cannot agree with everything that you have had to say.

I must say that I am somewhat sympathetic on a number of the points where you are in disagreement with Mr. Nader's position.

But your comments have been very helpful and balanced and, as I have indicated, come from a great deal of experience in the area.

I philosophically happen to believe that public ventilation, wherever possible, of decisions that are made by Federal agencies and men in positions of power in those Federal agencies is helpful in protecting the public interest.

I just have to analogize to what role a Congressman or a Senator finds himself in. Most important decisions on legislation are made in public on a vote.

Now, I am not talking about decisions made in executive session to change language and, of course, there are many decisions that are very important there that are made covertly, and there is a move now in the Congress to open up executive committee meetings. There is some sunshine bills that have been introduced, and I have cosponsored one of them.

I think that it ought to apply to executive sessions of congressional committees the same way that it should apply to Federal agencies.

But it does seem to me that you protect the public interest most often when you have public exposure of the decisionmaking process.

I think that what our legislation, Senator Gurney's legislation and my legislation, is designed to do is to create as much public ventilation as possible, without totally disrupting the consent decree procedure.

Certainly we do not want to throw all cases that are presently subject to consent decrees into the courts. That would be futile, and it would be costly, and it would not be promotive of justice in my mind, because it would mean such a delay in the settlement of cases and sometimes delay produces injustice. We all know that.

Speedy justice is necessary.

But, as I indicated, your remarks have been most helpful.

Dr. TURNER. May I just add—I hope I read you correctly in not indicating that we are in a major disagreement on the basic proposition that you have made.

I think we are talking about fine points.

Senator TUNNEY. Right.

We have minority counsel, Mr. Peter Chumbris, who may have some questions that he would like to ask.

Mr. CHUMBRIS. Mr. Chairman, the temptation is great, but the hour is late.

I will forgo any questions.

Senator TUNNEY. I am sorry, Pete.

Mr. CHUMBRIS. I think that we have fully covered everything.

Senator TUNNEY. OK, fine. Thank you, Peter.

Mr. CHUMBRIS. Dr. Turner has appeared before us on other aspects of 782.

Senator TUNNEY. Yes. Do you have anything, Mr. Bangert?

Mr. BANGERT. No.

Senator TUNNEY. Fine. Thank you very much.

Dr. TURNER. Thank you very much.

Senator TUNNEY. We are adjourned.

[Whereupon, at 5:13 p.m., the subcommittee was adjourned, subject to call by the Chair.]

AMERICAN BAR ASSOCIATION,
Chicago, Ill., April 10, 1973.

Hon. PHILIP A. HART,

Chairman, Subcommittee on Antitrust and Monopoly Legislation of the Judiciary Committee, Old Senate Office Building, Washington, D.C.

DEAR SENATOR HART: At its meeting in Chicago on April 9, the Administration Committee adopted the enclosed resolution presented to it by the Section of Antitrust Law of this Association. It would be appreciated if the resolution could be made a part of the hearing record on S. 782. A summary of the supporting report of the section is enclosed also for your committee's information.

Sincerely yours,

KENNETH J. BURNS, Jr.

Enclosure.

AMERICAN BAR ASSOCIATION
Section of Antitrust Law

RECOMMENDATION

Resolved: That the American Bar Association opposes the enactment of that part of the proposed "Antitrust Procedures and Penalties Act" (S. 782) which would substantially alter antitrust consent judgment procedures; and that among the reasons the proposed legislation should not be enacted are the following:

1. It fails to recognize that, in fact, present Justice Department procedures (Title 28 Code of Federal Regulations, Part 50.1) for the settlement of civil antitrust cases provide for widespread notice to the public, invite the views of interested persons, and provide for court hearings for the fair development of the issues on whether consent decrees should be entered, without the wasteful procedures inherent in the proposed legislation;

2. It would be harmful as tending to encumber and complicate the procedures for negotiation and entry of antitrust consent decrees, which constitute the great bulk of civil antitrust enforcement by the Government;

3. It would have a chilling effect upon the ability of the Government to obtain antitrust consent decrees, resulting in an unfortunate curtailment in this method of effectively terminating litigation;

4. It would create ambiguous and difficult situations respecting the status of third persons attempting to intervene in antitrust settlements.

Further Resolved, that the American Bar Association supports enactment of that part of the bill increasing the maximum monetary limit to \$500,000 for criminal penalties for certain antitrust violations by corporations, but opposes increased penalty limits for individuals.

Further Resolved, that, consistently with the Association's previous actions, the American Bar Association supports that part of the bill amending the Expediting Act.

Finally Resolved, that the President or his designee be authorized to present the views of the American Bar Association to the appropriate committees of the Congress.

Need for immediate action

Hearings have already commenced in Congress in S. 782. If the American Bar Association is to present its views on the legislation, action must be taken by the Administration Committee at its April meeting.

The Justice Department has presented its testimony to Congress on S. 782. The position set forth in the recommendation at the beginning of this report is almost identical to that of the Department of Justice.

Background

On February 20, 1973, the resolution set forth above was adopted unanimously¹ by the Council of the Section of Antitrust Law. The following is a brief summary of the Section's report, which is available upon request by any member of the Administration Committee who wishes to read the detailed report.

The proposed "Antitrust Procedures and Penalties Act" was originally introduced by Senator John V. Tunney (D-California) for himself and Senator Edward G. Gurney (R-Florida) as S. 4014 on September 21, 1972, and was referred to the Senate Committee on the Judiciary. No action was taken on the bill in the 92nd Congress. The proposal was reintroduced by Senator Tunney in the 93rd Congress as S. 782 on February 6, 1973. The text of the new bill is identical to that of the previous measure.

S. 782 covers three major subject areas: First, the bill creates complex procedures and new standards for determining the permissibility of consent decrees in antitrust settlements; second, the bill increases monetary penalties for criminal violations of the antitrust statutes; third, the proposal revises appellate review of antitrust cases under the Expediting Act.

Consent decrees

More than three-quarters of the civil antitrust suits brought by the Justice Department are terminated through consent decrees. The widespread use of decrees results primarily from the fact that Federal enforcement officials possess only a limited amount of personnel, resources, and time with which to prosecute violations of the antitrust laws. The widespread use of consent decrees means that the impact of S. 782 cannot be underestimated.

Section 2 of S. 782 establishes several new requirements which must be satisfied before a district court can enter a consent judgment in any civil or criminal antitrust proceeding brought by the Government. The new requirements and their purpose and effect are set forth below:

(a) The Government must file with the court and publish in the *Federal Register* any proposed consent decree. Current Justice Department procedures in such cases also require filing with the Court; however, the time which must elapse before a proposed decree can be entered is doubled, from 30 to 60 days. In addition to filing, the Justice Department now issues press releases announcing an antitrust settlement as soon as one is firm, even though an agreement may be one in principle only. The Department issues such releases, in part, to prevent insiders from taking advantage of their preferred position in the securities market.

The new requirements set forth in S. 782 for publication in the *Federal Register* would seem an expensive, unneeded procedure, in view of the minimal attention which the average citizen devotes to the daily contents of that publication. It would appear that the Department's present practice of issuing press releases is a better method of informing the public than publication in the *Federal Register*.

(b) The Government must also file and publish a public impact statement detailing various factors concerning the settlement. This statement must be filed with the court simultaneously with the proposed consent judgment, must be published in the *Federal Register* and must be made available to any persons requesting it. The public impact statement must contain the following six items: (a) a recitation of the nature and purpose of the antitrust proceeding; (b) a description of the practices or events giving rise to the alleged violation of the antitrust laws; (c) an explanation of the proposed judgment, relief, and anticipated effects on competition, including an explanation of any unusual circum-

¹ Miles W. Kirkpatrick abstained.

stances giving rise to the judgment or its provisions; (d) the remedies available to potential private plaintiffs damaged by the alleged violation in the event of the consent judgment; (e) a description of the procedures for modifying the proposed judgment; and (f) a description and evaluation of the alternatives to the proposed judgment and the anticipated effects on competition of such alternatives.

In view of the detail required for the public impact statements, it seems obvious that Government attorneys, economists and others may be required to spend extensive amounts of time in preparing such statements, unless the statements were to contain vast amounts of boiler plate language which would not lend significant insight to any particular settlement.

The Section of Antitrust Law does not believe that the expenditure of time in this way represents the most effective use of the limited resources of the Justice Department. In addition, some of the requirements would be difficult to fulfill and the statement, particularly as it applies to projections of impact on competition, would be only an educated guess. The requirement that the Government describe the remedies available to potential private plaintiffs may unduly limit the Government's position in negotiating a settlement, especially in those cases where the consent decrees require the defendants to make admissions for the express purpose of establishing prima facie evidence for purposes of private treble damage actions (the so-called "Asphalt Clause"). The requirement for a description of alternative rejected by the parties could prove a futile, non-productive task in view of the fact that a consent settlement is really a compromise of disputed issues.

(c) The public may submit to the Government written comments concerning the decree, and

(d) The United States must file and publish a response to all public comments. The legislation provides that the Government must receive and consider any comments during a 60-day period following the filing of the consent decree. Shortening of the 60-day period is prohibited except upon court order based on a showing of extraordinary circumstances, not adverse to the public interest. Further, the district court may grant additional time for the receipt and consideration of comments, with no limit placed on the length of time to which the court may extend the comment period. At the close of the comment period, the Government must file with the district court and publish in the *Federal Register* a response to the comments. The bill does not specify the exact time when the response must be filed and published. In the absence of an explicit time provision, the preparation of a detailed response may well consume substantial manpower and delay even further the ultimate resolution of an antitrust action, which could have been prolonged previously by court order lengthening the time granted for the receipt and consideration of comments.

(e) Each defendant must file a description of all communications relevant to the consent decree between any Government employee and the defendant (except his counsel of record) and certify that the description is true and complete. This description must be filed with the court within 10 days following the filing of any proposed consent judgment. The concept of "relevancy" may be interpreted so that it forecloses normal, informal citizen contact with Government representatives, while defendants may channel all communications through counsel to avoid the burden of keeping retrievable records. The result of this provision, highly questionable on policy grounds, may mean far less communication between Government officials and defendants, except on advice and through counsel.

(f) Before entry of a consent decree, the court must find that it is "in the public interest." In making this determination, the court must consider the individual, as well as the public, impact of a consent judgment. Because this requirement may be interpreted as an instruction to the court to weigh heavily the presence or absence of an "Asphalt Clause" in deciding whether a settlement should be approved, we may see far fewer antitrust settlements and a commensurate increase in the delay and backlog of court calendars, since defendants will undoubtedly continue to resist settlements which contain an "Asphalt Clause."

The court is also required to evaluate the public benefit to be derived from a determination of the issues at trial. It would appear that this requirement would force the court to usurp prosecutorial discretion.

(g) In determining whether the decree is "in the public interest," the court may employ several procedures, including employment of outside consultants

or expert witnesses. No provision is made in the legislation for paying any of these groups or individuals. The subsection also authorizes participation by "interested persons or agencies," disregarding completely the traditional concepts controlling intervention, and does not restrict an "interested person" to participation only at the public impact stage of the case. Such participation could turn a settlement hearing into a public debate or even a trial, with outsiders rehashing intricate and extensive settlement negotiations previously conducted between Government and defense counsel. Such a prolonged settlement hearing would prevent the exact savings which the settlement was intended to achieve.

On the basis of the foregoing considerations, it is therefore recommended that the provisions of Section 2 of S. 782 be formally opposed.

Increased criminal penalties

Section 3 of S. 782 increases the maximum criminal fine for violating Sections 1, 2 and 3 of the Sherman Act from the present \$50,000 to \$500,000 for corporations and from \$50,000 to \$100,000 for individuals. While it may be argued that the criminal indictment itself is the single most important deterrent to illegal conduct under the antitrust laws, it should be pointed out that large fines, which are not deductible as business expenses by either individuals or corporations, may constitute severe penalties.

S. 782 increases maximum individual fines for violations of the Sherman Act, while such violations are continued to be classified as misdemeanors. However, the bill does not propose any change in the \$5000 maximum fines for violations of the Wilson Tariff Act (restraints of trade by importers), of Section 14 of the Clayton Act (criminal liability of directors, officers, or agents authorizing a corporation's violation of penal provisions of antitrust laws), or of Section 3 of the Robinson-Patman Act (discriminatory discounts, geographical price discrimination, sales at unreasonably low prices, etc.). Before this disparity in penalties between the Sherman Act and its parallel criminal statutes is accentuated further, the reasons for such a move should be clearly stated. This growing disparity is enough to raise doubts as to the reasonableness of either the higher or, on the other hand, the lower, maximum. It should be noted that the maximum fines for various *felonies* under the Federal Penal Code and the Internal Revenue Code range from \$2,000 for destruction of public records, through \$5,000 for arson imperiling life and extortion by threat to kidnap or injure a person, to \$20,000 for increasing compensation of railroad carrier by increasing weight of mail. S. 782, by increasing the maximum fines for antitrust violations is, in essence, treating such violations as something akin to, or even more serious than, major felonies, while technically classifying them as misdemeanors because the maximum term for imprisonment remains at one year.

With regard to increased monetary penalties for corporations envisaged under S. 782, the increase from \$50,000 to \$500,000 might tend to cause top corporate management to pay greater heed to antitrust compliance by middle corporate management. Therefore, it is recommended that this portion of S. 782 be supported.

On the other hand, it is recommended that the increase in the maximum fines to be imposed on individuals be opposed. The most effective deterrent for individuals may be the fact of indictment itself and the possibility of a prison sentence imposed upon an individual causing the infraction. It seems unlikely that monetary fines ever will have the same deterrent effect as imprisonment.

Expediting Act Reform

Section 4 of S. 782 amends the Expediting Act to eliminate direct appeal to the Supreme Court of antitrust civil actions brought by the Government and substitutes intermediate appellate review of all such cases except those of general public importance. It also authorizes the Government to appeal to the courts of appeals when a district court denies a preliminary injunction. Appellate decisions on interlocutory appeals are subject to Supreme Court review upon grant of a writ of certiorari. Finally, Section 4 eliminates three-judge district court panels in civil actions brought by the Government under the Sherman Act, Clayton Act or certain sections of the Interstate Commerce Act.

A resolution approved by the House of Delegates in February, 1966, upon recommendation of the Section of Antitrust Law, suggested all amendments to the Expediting Act set forth in S. 782, except the elimination of three-judge district courts. (A copy of the 1966 resolution is attached.) Regarding the latter provision, Chief Justice Burger stated, at the 1972 Annual Meeting, "We should

totally eliminate the three-judge district courts that now disrupt district and circuit judges' work. Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one in five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist. There are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it. . . .

In view of the above, it is recommended that the general goals contained in Section 4 of S. 782 be supported and that steps be taken to insure that reform of the Expediting Act be enacted by the Congress.

Exhibit

RESOLUTION APPROVED BY THE HOUSE OF DELEGATES, FEBRUARY 1966

AMENDMENT OF EXPEDITING ACT

Whereas, direct appeals to the United States Supreme Court in cases brought by the Government for equitable relief under the Federal antitrust laws, as provided by the Expediting Act (15 U.S.C. Sec. 29, 49 U.S.C. Sec. 45) are a burden upon the Supreme Court and are unnecessary and inappropriate in the great majority of cases; and

Whereas, proposed bills to amend the Expediting Act, sponsored in 1963 by the Department of Justice and the American Bar Association, respectively, have proved unacceptable to the Judicial Conference of the United States, and have been otherwise criticized; and

Whereas, there is a continuing need for an amendment of the Expediting Act which would eliminate direct appeals to the Supreme Court in ordinary equity cases brought by the Government under the antitrust laws, while providing for direct appeals in exceptional cases;

Resolved, That the American Bar Association recommends to the Congress that legislation be enacted to amend the Expediting Act, 32 Stat. 823 (1903), 15 U.S.C. Sec. 29, 49 U.S.C. Sec. 45, to provide that appeals from District Courts in cases brought by the United States for equitable relief under the Federal antitrust laws shall be to the court of appeals, rather than directly to the United States Supreme Court, with appeals to the Supreme Court thereafter under writ of certiorari, but providing that appeals from district courts may be made directly to the Supreme Court in such cases wherein the district court certifies that immediate review by the Supreme Court is appropriate in the interest of justice, or the Attorney General certifies that immediate review of the case, or a particular question of law therein, is of general public importance;

Resolved, That the Association proposes that the foregoing be achieved by passage of a bill embodying the principles set forth in the proposed bill hereinafter set forth; and

Further resolved, That the officers and Council of the Section of Antitrust Law are authorized and directed to urge legislation in conformity with the foregoing recommendations upon appropriate committees of Congress.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., May 16, 1973.

Hon. PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly, Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: Under date of April 10, 1973 Mr. Kenneth J. Burns Jr. transmitted a resolution adopted by the ABA Administrative Committee with reference to S. 782 introduced by Senator Tunney. In preparing the resolution the Administrative Committee had before it a report prepared by the Antitrust Section of ABA, which Section is made up of over 8000 lawyers from all over the United States who have a special interest in the field of antitrust and trade regulation law. Mr. Burns' letter requested that the resolution be made a part of the hearing record and it is our understanding that this is being done.

Included as an addendum to the copy of the resolution as transmitted by Mr. Burns' letter, was an ABA Staff Summary of the Antitrust Law Section's report

mentioned above. This "summary" being mainly devoted to a digest of S. 782, omits a great deal of the substantive material contained in the report and relied upon by the Council of the Antitrust Section in making the recommendation upon which the resolution of the Administrative Committee is based.

It is our sincere belief that the entire report relied upon by the Council of the Antitrust Section would not only be of current interest to the Senate Antitrust Subcommittee staff, but that it would also be of interest to subsequent students of legislative history. Accordingly I am forwarding herewith a complete copy of the *Report to the Council for the Section of Antitrust Law Re Proposed Antitrust Procedures and Penalties Act* with the request that such report be included in the hearing record in lieu of the "summary" above referred to.

Sincerely yours,

F. GERALD TOZE,
Chairman, Committee on Legislation.

REPORT TO THE COUNCIL OF THE SECTION OF ANTITRUST LAW RE PROPOSED
"ANTITRUST PROCEDURES AND PENALTIES ACT" *

PART I—INTRODUCTION

A. PURPOSE

The purpose of this report is to review in some detail the provisions of proposed Federal legislation entitled the "Antitrust Procedures and Penalties Act."¹ Further, the report comments upon and presents certain observations and recommendations concerning the bill.

As background information a copy of each of the following is attached: the proposed legislation, Senator John V. Tunney's speech in support of the bill, Senator Tunney's letters to the antitrust bar and to the [then Acting] Attorney General, and the [then Acting] Attorney General's response. Also attached are Professor Donald F. Turner's remarks concerning the proposal, a Report of the House of Delegates of the American Bar Association concerning certain aspects of the proposed legislation, and copies of congressional reports on previous bills dealing with segments of the proposed legislation. The legislation as introduced in the 92d Congress and the author's comments when he introduced that bill are also attached.

B. BACKGROUND

The proposed "Antitrust Procedures and Penalties Act" was originally introduced as S. 4014 on September 21, 1972, by Senator John V. Tunney (D-California) for himself and Senator Edward J. Gurney (R-Florida). After introduction, the bill was referred to the Senate Committee on the Judiciary. No action was taken on the measure in the 92d Congress. Senator Tunney reintroduced the proposal in the 93d Congress as S. 782 on February 6, 1973. The text of S. 782 is identical to that of S. 4014. The proposal is often referred to as the "Tunney bill."

S. 782 covers three major subject areas:

First, the bill creates complex procedures and new standards for determining the permissibility of consent decrees in antitrust settlements.

Second, the bill increases monetary penalties for criminal violations of the antitrust statutes.

Third, the proposal revises appellate review of antitrust cases under the Expediting Act.

This summary demonstrates that this bill contains proposals which would have a major impact upon several phases of antitrust actions—both civil and criminal. Because of the varied subjects contained in the proposed legislation, it merits the immediate attention of not only the Council but also the American Bar Association.

More than three-quarters of the civil antitrust suits brought by the Justice Department are terminated through consent decrees.² The widespread use of

*For action taken on this Report by the Council of the Section of Antitrust Law, see appendix "A" hereto.

¹ S. 782, 93d Cong., 1st sess. (1973); the identical bill was introduced in the previous Congress as S. 4014, 92d Cong., 2d sess. (1972).

² 119 Cong. Rec. S. 2137-2138 (daily ed. Feb. 6, 1973) (remarks of Senator Gurney); Rashid, *Consent Decree Process in Proper Focus*, 5 Trade Reg. Rept. (1972 Trade Cas.) ¶ 50, 137 at 55,224; and 118 Cong. Rec. S15551 (daily ed. Sept. 21, 1972) (remarks of Senator Tunney).

decrees results primarily from the fact that Federal enforcement officials possess only a limited amount of personnel, resources, and time with which to prosecute violations of the antitrust laws. Faced with the inability to prosecute to completion all asserted violations, they must decide which infractions are so blatant or so malevolent as to require prosecution through a full, public trial, and, on the other hand, which actions are appropriate for settlement through consent decrees, thereby avoiding prolonged trials and appeals.³

The widespread use of consent decrees in antitrust settlements means that the impact of Senator Tunney's bill cannot be underestimated. For this reason alone, it deserves careful consideration and study by the Council as well as by the ABA.

PART II—ANALYSIS OF S. 782

This part of the report reviews and comments upon each of the specific proposals contained in the bill. The analysis is divided into three sections, each of which discusses one of the three major subject areas of S. 782; consent decrees, criminal penalties, and appeals.

A. CONSENT DECREES

Section 2 of S. 782 establishes several new requirements which must be satisfied before a district court can enter a consent judgment in any civil or criminal antitrust proceeding brought by the Government.

Basically, these new conditions precedent to the entry of a consent decree may be summarized as follows:

(a) The Government must file with the court and publish in the *Federal Register* any proposed consent decree;

(b) The Government must also file and publish a "publish impact statement" detailing various factors concerning the settlement;

(c) The public may submit to the Government written comments concerning the decree;

(d) The United States must file and publish a response to all public comments;

(e) Each defendant must file a description of all communications relevant to the consent decree between any Government employee and the defendant (except his counsel of record) and certify that the description is true and complete;

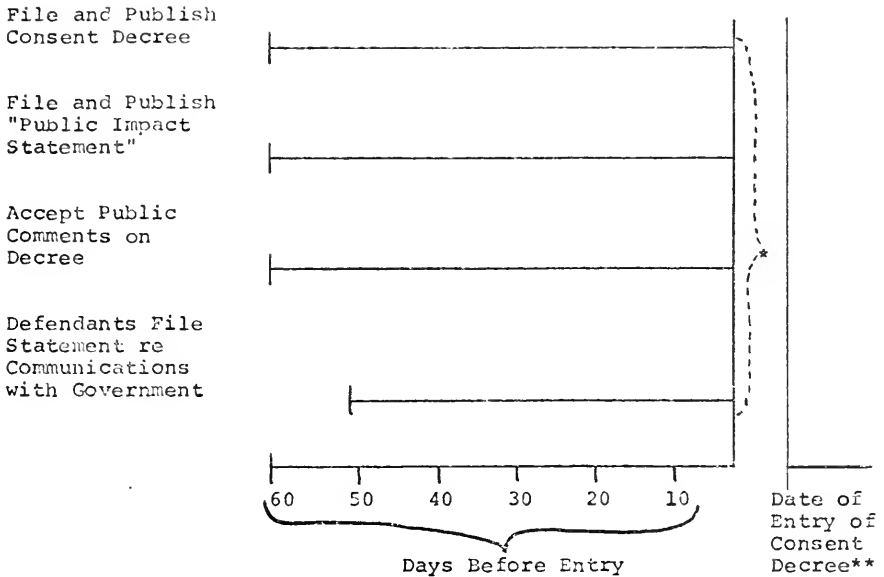
(f) Before entry of a consent decree, the court must find that it is "in the public interest"; and

(g) In determining whether the decree is "in the public interest," the court may employ several procedures, including full or limited participation by interested persons or agencies, which are not parties to the action.

The following table summarizes the time framework for these filings:

³ Baddla J. Rashid, the Director of Operations, Antitrust Division, U.S. Department of Justice, recently reiterated the Department's long-standing policy to terminate antitrust actions through the entry of consent decrees in many situations. See Attr. No. 589, D-1, Nov. 21, 1972.

"Before Entry" **



* - Major tasks to be accomplished during additional time period "before entry" of consent decree:

1. Court must determine decree "in public interest."
2. "Interested persons" allowed full or limited participation.
3. Government must file and publish response to comments.
4. Statement must be certified before entry of decree.

** - Time of entry is necessarily indefinite because of the four major tasks which must be accomplished "before entry."

The goal of these new procedures is to increase public awareness of, and participation in, consent decree settlements. Before reviewing the Senator's proposal in detail, the threshold question to be answered is whether or not the present procedures for public comment on consent judgments are adequate. Hence, a review of the current procedures for eliciting public comment is in order.

1. *Present procedures for eliciting public comment*

The procedures currently used to elicit public comment on proposed consent judgments are contained in Part 50 of Title 28 of the *Code of Federal Regulations*. Part 50.1, which establishes the Justice Department's consent judgment policy, provides as follows:

"§ 50.1 Consent judgment policy.

(a) It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to prevent or restrain violations of

the antitrust laws only after or on condition that an opportunity is afforded persons (natural or corporate) who may be affected by such judgment and who are not named as parties to the action to state comments, views or relevant allegations prior to the entry of such proposed judgment by the court.

(b) Pursuant to this policy, each proposed consent judgment shall be filed in court or otherwise made available upon request to interested persons as early as feasible but at least 30 days prior to entry by the court. Prior to entry of the judgment, or some earlier specified date, the Department of Justice will receive and consider any written comments, views or relevant allegations relating to the proposed judgment, which the Department may, in its discretion, disclose to the other parties to the action. The Department of Justice shall reserve the right (1) to withdraw or withhold its consent to the proposed judgment if the comments, views or allegations submitted disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate and (2) to object to intervention by any party not named as a party by the Government.

(c) The Assistant Attorney General in charge of the Antitrust Division may establish procedures for implementing this policy. The Attorney General may permit an exception to this policy in a specific case where extraordinary circumstances require some shorter period than 30 days or some other procedure than that stated herein, and where it is clear that the public interest in the policy hereby established is not compromised."

As a supplementary method of informing the public of a proposed consent judgment, the Justice Department issues press releases announcing an antitrust settlement as soon as one is firm, even though an agreement may be one in principle only.⁴ The Department issues such press releases, in part, to prevent insiders from taking advantage of their preferred position in the securities market.

How well has the procedure of filing consent decrees and issuing press releases worked? Have these methods successfully informed the public about a settlement and resulted in the receipt of comments thereon?

No statistics have been found detailing the exact number of comments received each time an antitrust settlement has been announced. However, several reported cases have detailed recently the degree of success of the filing and press release procedure, as measured by the amount of public comments submitted on a proposed consent judgment. These cases are: *United States v. Ling-Temco-Vought*,⁵ *United States v. Automobile Mfrs. Assn. Inc.*,⁶ and *United States v. International Tel. & Tel. Corp.*⁷

In *Ling*, the Government brought an action alleging that defendants were violating Section 7 of the Clayton Act and that two of the defendants should divest themselves of all ownership in the third corporate defendant. The Government and defendants proposed a consent judgment for court approval, and the court scheduled an open public hearing to determine the fairness of the settlement. The judge recounted that "dozens of letters were sent to me by interested persons. Such letters were ordered filed and made a part of the record. The hearing on June 1 was attended by a large group of persons and those individuals who desired to be heard were given an opportunity to do so."⁸

The comments came from rather diverse individuals: "heavy investors in LTV who have seen their fortunes reduced,"⁹ "individuals, who had purchased securities of J&L, particularly as a nest egg to guarantee them an income in their advanced years,"¹⁰ "employees and pensioners of J&L,"¹¹ "the Presidents of two Unions of United Steelworkers of America . . . Local 1843 at Pittsburgh, Pennsylvania, and . . . Local 4793 at Ishpeming Michigan,"¹² and "one individual who had 50,000 shares of stock which at one time was valued at \$168.00 per share and is now quoted at \$8.00 per share."¹³ The *Ling* opinion presents one example of a

⁴ Letter from Richard G. Kleindienst to John V. Tunney, Apr. 7, 1972, in 560 Attr. No. 560, F-1, Apr. 25, 1972.

⁵ *United States v. Ling-Temco-Vought, Inc., et al.*, 315 F. Supp. 1301 (W.D. Pa. 1970).

⁶ *United States v. Automobile Manufacturers Association, Inc., et al.*, 1969 Trade Case ¶ 73,070 at 88,202 (C.D. Cal. Nov. 7, 1969).

⁷ *United States v. International Telephone & Telephone Corp., et al.*, 5 Trade Reg. Rept. (1972 Trade Case) ¶ 74,152 at 92,802 (D. Conn. Sept. 7, 1972) affirmed 5 Trade Reg. Rept. (1972 Trade Case) ¶ 74,372 at 93,712 (U.S. Supreme Court No. 72-823, Feb. 22, 1973).

⁸ *United States v. Ling-Temco-Vought, supra*, note 8, at 1303.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, at 1309.

¹² *Id.*

¹³ *Id.*, at 1303.

large number of very disparate individuals (a) receiving notice and (b) commenting on a proposed consent judgment as a result of the presently-used procedures. If success is to be measured in terms of the number of comments received from different individuals, the present procedures appear to have worked quite well in *Iáng*.

The *Automobile Mfgs. Assn., Inc.*, opinion reports that, "after the 30-day period had expired, this court held an open hearing at which time all persons wishing to appear as *amici curiae* were permitted to voice their objections. Appearances have been made on behalf of many States, counties, cities, air pollution control districts, congressional groups, associations and interested individuals."¹⁴

A third example of public comment stimulated by consent decree filing and publication is found in the ITT settlement. Although the court did not specify the total number of comments received, the court noted that the Justice Department "gave interested parties 30 days within which to examine the proposed decree and register objections to it. [Ralph Nader and Reuben B. Robertson, III] did in fact submit comments to the Department objecting to the terms of the decree."¹⁵

While these cases cannot be taken as a complete review of the degree of success of the Government's filing program under 28 C.F.R. § 50.1, they demonstrate that the current procedures have been rather successful in informing the public and causing them to respond with comments concerning a proposed consent judgment. Further, they indicate that a 30-day period is lengthy enough for the public to learn about, and then comment upon, a consent judgment.

With this background review in mind, let us now consider in detail the Senator's proposed conditions precedent to the entry of a consent judgment.

2. File consent decree and publish in *Federal Register*

Section 2(b) of S. 782 requires the Government to file a proposed consent judgment with the district court and publish it in the *Federal Register*. The filing and the publishing must occur at least 60 days prior to the effective date of the decree.

The filing requirement is similar to that which the Justice Department currently employs, as prescribed in 28 C.F.R. § 50.1. One difference is that the minimum number of days which must elapse before a proposed decree can be entered is doubled from 30 to 60 days.

The legislation does not codify any requirement that the Justice Department issue a press release at the time a proposed settlement is filed with the court. If the omission of a press release is designed to abolish this practice, Congress should consider whether the *Federal Register* or media distribution constitutes the better means to inform the public of a consent judgment. Given the minimal attention which the average citizen devotes to the daily contents of the *Federal Register*,¹⁶ it would appear that a press release is the better method of reaching the public than filing in the *Federal Register*. If such be the case, the *Federal Register* publishing may constitute an expensive, unneeded procedure.

3. Public impact statement

The second sentence of Section 2(b) requires the Government, unless otherwise instructed by the court, to file with the district court a "public impact statement." The public impact statement must contain the following six items:

- (a) A recitation of the nature and purpose of the antitrust proceeding;
- (b) A description of the practices or events giving rise to the alleged violation of the antitrust laws;
- (c) An explanation of the proposed judgment, relief, and anticipated effects on competition, including an explanation of any unusual circumstances giving rise to the judgment or its provisions;
- (d) The remedies available to potential private plaintiffs damaged by the alleged violation in the event of the consent judgment;
- (e) A description of the procedures for modifying the proposed judgment; and
- (f) A description and evaluation of the alternatives to the proposed judgment and the anticipated effects on competition of such alternatives.

¹⁴ *United States v. Automobile Manufacturers Association, Inc.*, *supra*, note 6, at 88,203.

¹⁵ *United States v. International Telephone & Telegraph*, *supra*, note 7, at 92,804.

¹⁶ See, e.g., 117 Cong. Rec. S17886 (daily ed. Nov. 8, 1971) for remarks of Senator Quentin Burdick (D-N. Dak.) indicating infrequent public reference to the *Federal Register*.

The public impact statement must be filed with the court simultaneously with the proposed consent judgment. The Government must also publish the statement in the *Federal Register* and furnish a copy of it to any person requesting it.¹⁷

The provision for preparation of public impact statements has implications for potential, additional delays in the ultimate resolution of antitrust actions. Since the public impact statement must satisfy the six requirements of Section 2(b)(1) through (6), Government attorneys may be required to consume extensive periods of time in drafting and finally presenting statements. In fact, the public impact statement provisions spell out a monumental task for almost any important case. The numbers of lawyers, economists, and others whose talents would be drawn into this venture would be substantial. Can the Antitrust Division realistically be expected to handle this load, over and beyond the intricate negotiations and drafting of consent decrees? If public impact statements are not prepared with attention requisite to each individual case, they may tend to contain vast amounts of boiler-plate language which does not lend significant insight to any particular settlement.

Before mandating a public impact statement with its potentially burdensome requirements, Congress will wish to consider carefully the massive additional time and effort which must be devoted to each settlement of an antitrust case in order to comply with the proposed new procedures. Is this the way the Justice Department can best expend part of its limited resources?

Let us examine for a moment each of the six aforementioned mandatory requirements of a public impact statement. Sections 2(b)(1) and (2) apparently require a thorough review of not only the complaints, amended complaints and pleadings, but, also the evidence, depositions, answers to written interrogatories, exhibits and documents produced when a decision is made to settle.

Subsection (3) requires the Government to explain the proposed judgment and its anticipated effects on competition. This explanation may well require the assistance of trained economists or other specialists. Since the statements concerning competition are only projections and anticipations, they may well be uncertain and conjectural.

The obscure and indefinite requirement of subsection (3) that the Government provide "an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein" appears to assume that a proposed judgment may be the result from some oddity, quirk, misfeasance, malfeasance or even worse. The bill contains no standards defining what constitute "unusual circumstances."¹⁸ Query: if a case involves one of the largest corporations in the nation, does that make it unusual?

Section 2(b)(4) requires that a public impact statement describe the remedies available to a potential private plaintiff allegedly damaged by antitrust violation.¹⁹ This may obligate the Justice Department to describe to a potential private plaintiff what rights he may have under the Federal antitrust laws. In addition, the Department conceivably could be required to state whether the action could or should be brought as an individual action or as a class action.²⁰

¹⁷ Presumably, the proposal for the Government to furnish the public impact statement to anyone who requests it is designed to inform the public quickly and accurately concerning the settlement. In view of the expense of producing copies of such documents for the public, it might be more suitable to refer interested persons to the *Federal Register* (assuming it contains the decree and statements). Since the *Federal Register* is received by every library serving as a Government depository, an interested person might obtain the complete text of the settlement even more readily than through correspondence with the Justice Department.

¹⁸ In remarks in the *Congressional Record*, Senator Tunney states that his bill results, in part, from the politically controversial settlement in *United States v. International Telephone & Telegraph Corp.*, *supra*, note 7. If the "unusual circumstances" language is designed to apply only to the ITT settlement, perhaps it has little or no general application to most consent judgments.

¹⁹ The language of subsec. 2(b)(4), as presently drafted, seems to assume that, when a defendant in a government antitrust action settles, he admits liability and admits that he has caused damage to the potential private plaintiffs. Certainly, this is not the case; therefore, in subsec. (4) the word *allegedly* should be inserted between the words *plaintiffs* and *damaged* in line 21 of p. 2 of S. 4004.

²⁰ Commentators have noted both the steady increase in expertise of the plaintiff antitrust bar and the favor under which antitrust class actions flourish pursuant to revised Rule 23, Federal Rules of Civil Procedure. In light of these developments, it seems superfluous for the Tunney bill to require the Justice Department to further educate the antitrust bar as well as potential plaintiffs regarding any remedies they may have. In effect, this provision might turn the Justice Department into an ancillary legal aid office dispensing advice to potential private antitrust litigants.

In describing the remedies available to potential private plaintiffs, Senator Tunney may involve the Justice Department even further in that area of the antitrust law known as the "Asphalt Clause". The term Asphalt Clause derives from the so-called "Asphalt Cases"²¹ and results from a peculiarity of a consent judgment entered in a civil or criminal antitrust case.²²

If a consent judgment contains an "Asphalt Clause," one of the remedies available to a potential plaintiff is to bring a private treble damage action using the "Asphalt Clause" admission as prima facie evidence against the defendant. Section 2(b)(4) apparently requires the Government to describe this remedy. If an Asphalt Clause is not included in the consent decree, will subsection 2(b)(4) require the Government to go so far as to describe why it did not insist on such a clause and the effect upon a private plaintiff of the absence of such a clause?

Under subsection 2(b)(5) a public impact statement must describe the procedures available for modification of the proposed judgment. Many antitrust settlements and consent decrees issued thereon continue under court jurisdiction for decades. In the Packers litigation,²³ a 1920 consent decree was not modified until the 1970's—a full half century later. If the Government must describe the contingencies involved in such a prolonged modification procedure, the task could become quite burdensome.

The final requirement of the public impact statement is that it describe and evaluate (1) alternatives to the proposed judgment and (2) the anticipated effects on competition of such alternatives. Since the burden of satisfying this requirement rests upon the Government, it should be realized that this requirement may impose a tremendous strain upon the economists, statisticians and accountants available to the Government for expert advice in antitrust cases. Moreover, these projections may be relatively uncertain. Simply put, the question appears in large measure to be whether such experts can be better utilized in preparing public impact statements as to anticipated effects on competition of various discarded alternatives or whether they can be more effectively utilized in assisting the Justice Department's prosecution of other antitrust violators. Given that the parties have rejected alternative settlement formulae, analyses of the discarded alternatives could well prove to be rather futile, nonproductive tasks. Since a consent settlement is, after all, a compromise of disputed issues, perhaps it is inappropriate to delve into why one alternative was accepted and another rejected.

4. Public comment and Government response

Section 2(c) of S. 782 provides that during a 60-day period following the filing of a consent decree the United States shall receive and consider any written comments relating to the proposed judgment. The subsection prohibits shortening the 60-day period except upon court order based on a showing of extraordinary circumstances, not adverse to the public interest. Further, the subsection allows a district court to grant additional time for the receipt and consideration of written comments, but places no limit on the length of time which the court may extend the comment period.

At the close of the comment period, the Government must file with the district court and publish in the *Federal Register* a response to the comments. This response is a mandatory requirement, and there is no provision for waiver or modification of it. The bill does not specify the exact time when the response must be filed and published. In the absence of an explicit time provision, the preparation of a detailed response may well consume substantial manpower and delay even

²¹ *United States v. Allied Chemical Corp.*, 1961 Trade Case ¶ 69,923, at 77,641 (D. Mass. 1960); *United States v. Bituminous Concrete Association, Inc.*, 1960 Trade Case ¶ 69,878, at 77,487 (D. Mass.); *United States v. Lake Asphalt & Petroleum Co.*, 1960 Trade Case ¶ 69,835, at 77,272 (D. Mass.).

²² Section 5(a) of the Clayton Act provides that a final judgment in any civil or criminal antitrust action brought by the Government constitutes prima facie evidence of the adjudicated antitrust violations in any other action brought by any other party *except* that no consent decree or judgment entered before testimony has been taken may be used as prima facie evidence of any violation. In the *Asphalt Cases* the Government wanted to avoid the exception contained in sec. 5(a), and it required the defendants to make admissions which were for the express purpose of giving prima facie evidentiary effect to the decree for purposes of private treble damage actions. The term "Asphalt Clause" became a shorthand method of referring to the type of admission demand by the Government in the *Asphalt Cases* consent decree.

²³ *United States v. Swift Co., Armour and Co., Wilson & Co., Inc., and Cudahy Co., et al.*, 1971 Trade Case. ¶ 73,760 at 91,203 (N.D. Ill.).

further the ultimate resolution of an antitrust action (which could have been prolonged once before by a court order lengthening the time granted for the receipt and consideration of written comments).

5. *Court determination that consent decree is "in public interest"*

As a prerequisite to entry of a consent judgment, Section 2(d) requires a court to find that the consent decree is "in the public interest". In making this determination, the court must consider:

(a) the public impact of the judgment with all of its elements as set forth above; and

(b) the impact of the entry of the judgment upon the public generally and individuals alleging specific injury, including the public benefit to be derived from trial of the case.

By requiring the Court to consider the individual as well as the public impact of a consent judgment, subsection 2(d) may well thrust the courts into the middle of the "Asphalt Clause" controversy, described *supra*. Because a judgment containing an "Asphalt Clause" helps an individual plaintiff in another action to establish a prima facie violation, the inclusion of an "Asphalt Clause" may well strengthen the bargaining position of a private plaintiff in a treble damage action.

Since the subsection requires courts to consider the impact of the consent judgment on "individuals alleging specific injury," Congress may well be telling the courts to weigh heavily the presence of an "Asphalt Clause" in deciding whether a settlement should be approved. Thus, if section 2(d) is read to give congressionally-favored status to "Asphalt Clauses" yet defendants continue to resist settlements containing such clauses, we may see far fewer antitrust settlements and a commensurate increase in the delay and backlog of the court calendars. Such a result would place added strains and burdens upon the limited governmental enforcement resources and personnel.

In making a "public interest" determination, the court is also required by Section 2(d) (2) to evaluate the public benefit to be derived from a determination of the issues at trial. Does this requirement ask a court to overstep its bounds and to enter the area of prosecutorial discretion? In deciding whether or not to propose entry of a consent decree in any action, the Antitrust Division considers, as a matter of policy, the importance and value of a public trial which may serve as an example to others.²⁴ Even when the Government decides initially whether or not to bring a certain lawsuit,²⁵ that determination is based, in part, on a consideration of the importance of a public airing of the issues and allegations in the courts. Continually the Justice Department is confronted with the dilemma that it does not possess enough personnel or resources to prosecute adequately all violations of the antitrust statutes. Since this is the case, it is questionable whether judges should take this matter out of the hands of governmental enforcement officials and decide for themselves which violations should be prosecuted through to trial and which should not.

6. *Procedures court may use to determine if judgment is in public interest*

Section 2(e) establishes certain procedures which the court may use in determining whether the entry of a consent judgment is in the public interest. One device, described in subsection 2(e) (1), is to take the testimony of Government officials or other experts upon motion of any party, participant, or the court. The legislation does not define the term "participant", but conceivably this could allow various types of non-parties to enter the proceedings at the settlement stage.

In subsection 2(e) (2), the court is authorized to appoint a special master, other outside consultants or expert witnesses to advise the court regarding the proposed consent decree. The court is authorized further to obtain the views, evaluations or advice of any individual, group or governmental agency with respect to the proposed judgment or its effect.²⁶ By authorizing a court to consult

²⁴ Just three months ago, the Director of Operations of the Justice Department's Antitrust Division reiterated the fact that, "[T]he Division will oppose nolo pleas [and consent decrees attendant thereto] in those cases involving blatant and reprehensible violations, and especially where jail sentences against individual defendants will be sought." ATTR, No. 589, D-1, Nov. 21, 1972.

²⁵ The Government's wide latitude in the area of prosecutorial discretion was recently noted by Prof. Donald H. Turner, who observed that " * * * the Government can decline to bring a case at all, can settle a potential case informally on the basis of written undertakings, and can decline to prosecute further a case it decides is no longer worth pursuing." (Remarks, Donald F. Turner, National Institute of Section of Antitrust Law, American Bar Association, Atlanta, Ga., Nov. 10, 1972.)

²⁶ The text of the bill reads "with respect to any aspect of the proposed judgment of [sic] the effect thereof." It appears that the word *of* should read *on*.

with any governmental agency, the legislation may well be placing the great and diverse panoply of governmental departments, agencies and organizations at the behest of each district court whenever it is determining whether to approve a settlement. The legislation makes no provision for the payment of the masters, consultants, expert witnesses, individuals, groups or Government agencies which may be called upon at this stage of the litigation, and consideration should be given to who will have to pay how much for this consultation.

One of the most far-reaching and potentially controversial provisions of S. 782 is found in Section 2(e) (3). This subsection authorizes full or limited participation in the court proceedings by "interested persons or agencies." This section disregards traditional concepts controlling intervention²⁷ and allows the court to authorize the participation of these "interested persons." Once a court allows their participation, they may examine witnesses, review documentary materials or participate in any other manner and extent which the court deems to serve the public interest. The legislation does not specifically restrict an interested person's participation only to the public impact stage of the litigation. The bill should make clear that an interested person's participation is limited to the settlement stage only, even though a settlement may fall through.

If too many interested persons participate,²⁸ a settlement hearing could be transformed²⁹ into an event resembling an unmanageable public debate or even a trial, with outsiders rehashing intricate and extensive settlement negotiations previously conducted between Government and defense counsel. If such is the case, a prolonged settlement hearing would prevent the exact savings which the settlement was intended to achieve.

When he introduced S. 782, Senator Tunney labeled all of these procedural devices as "discretionary." However, he noted that in very complex cases failure to use some of these devices could constitute an abuse of discretion.³⁰ If the element of discretion is to be withdrawn from the court to any extent, the bill should include criteria for the court to use in order to avoid needless error.

Section 2(e) (4) allows the court to review the public comments and the government's response to them. This is a discretionary, rather than mandatory, requirement. But since a major purpose of the proposed legislation, is to create a mechanism which will allow the public to review and comment upon negotiated antitrust settlements, to submit their observations to the court, and to have their opinions assessed by the Government, then it is quite surprising that the bill does not mandatorily require a court to review these comments before deciding whether or not to approve a particular consent decree. If a court is not even required to review the comments and the response, then all the efforts to create a mechanism for citizen participation in the consent decree procedure may well have been for naught. In view of the time, expense, and effort involved in the preparation, review and submission of the comments and response, surely a court review of such statements should be mandatory rather than permissive.

7. Filing of communications

Section 2(f) requires that, within 10 days following the filing of any proposed consent judgment, each defendant must file with the district court a description of all written or oral communications by or on behalf of the defendant with any

²⁷ In *Sierra Club v. Morton*, — U.S. —, 31 L. Ed. 636, 643, 644 (1972), the Supreme Court most recently discussed standards for intervention, observing that an intervenor has standing only if injured in fact, and that " * * * the 'injury in fact' tests requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." The Sierra Club appeared to take the view that its concern and expertise were " * * * sufficient to give it standing as a 'representative of the public.'" Addressing itself to this view, the Court said that "[t]his theory reflects a misunderstanding of our cases involving so-called 'public actions' in the area of administrative law." If a person or group can make the showing required, Rule 24, Federal Rules of Civil Procedure, permits intervention to those having an intervention right by a statute or having a claim or defense in common with the main action.

²⁸ In commenting on the proposal for increased public participation, Prof. Donald F. Turner observed at the National Institute of Section of Antitrust Law, ABA, on November 10, 1972 that, "I think we can confidently expect that there will be attempted intervention, a rash of comments, and at least some prolongation of proceedings in all but the most routine cases, and probably in the latter as well."

²⁹ Prof. Turner cautioned against this development, stating that, " * * * I am convinced myself that whatever the prospects may be in the development of a more coherent and rational antitrust policy, they do not lie in diluting the role of the Department of Justice; they do not lie in making each government antitrust case a vehicle for participating democracy."

³⁰ 118 Cong. Rec. S15552 (daily ed. Sept. 21, 1972) (remarks of Senator Tunney).

officer or employee of the United States concerning or relevant to the proposed consent judgment. The concept of "relevancy" is obviously a very broad one, and the term should be very carefully reviewed before it is actually included in the statutory language.

Care should be given to the drafting of this provision so that it does not foreclose normal, informal citizen contact with governmental representatives. Since the bill exempts from the disclosure requirement any communications by counsel, we may find defendants channeling all communications with the Government through counsel in order to avoid the burden of keeping retrievable records concerning all such communications. The result may be a distinction of form over substance. Rather than promoting free communication between Government and governed, this provision may result in far less communication between Government officials and defendants, except upon advice and through the counsel. On policy grounds, this is a highly questionable result.

When Senator Tunney originally introduced the bill, Victor H. Kramer, Director of the Institute for Public Interest Representation at the Georgetown University Law Center, made the following observation:

"Defendants and their counsel have a right and a duty to confer with lawyers in Government who accuse them of wrong. Such meetings for the purpose of endeavoring to settle antitrust cases are to be encouraged. The advantages to a defendant's competitors, customers and the general public of knowledge of these meetings and their purpose is, in my judgment, outweighed by the time consumed in complying with such a rule and the possible chilling effect on the negotiations."³¹

The requirement that all written or oral communications must be not only reported but also summarized may prove to be an excessively burdensome task when one considers larger businesses which have many branches and many divisions dealing with various agencies of the Government collecting different types of data for compliance with Federal laws. Before the enactment of such a reporting provision, Congress should consider the problems involved in the reconstruction of old conversations (respecting which there may or may not be handwritten notes), conferences, meetings, and the like which may extend over many years of time and involve a large number of individuals who may, or may not, still be employed by the defendant. In view of the problems of retrieval of this information, many defendants may find it exceedingly difficult to certify that such a filing, when made, is a true and *complete* description of the communications. To undertake completion of such a task the non-extendable, mandatory 10-day period immediately following the filing of the consent decree may prove to be a hazardous task to say the least.

8. Admissibility of proceedings and statements

Section 2(g) specifies that district court proceedings relative to both public interest determinations and public impact statements are not admissible against any defendant in any antitrust action or proceeding brought by any other party against the defendant. Nor shall such proceedings be the basis for the introducing of a consent decree as prima facie evidence against the defendant in another antitrust action. At first blush, this provision appears to prohibit the use of consent decrees with the force of "Asphalt Clauses". However, when Senator Tunney introduced his bill, he stated on the floor of the Senate, "[T]his provision is not intended to affect the Government's ability to require a so-called asphalt clause providing such effect where such a clause is deemed appropriate".³² As discussed above, the Government's insistence upon an "Asphalt Clause" in a consent decree would cause many defendants to refuse to enter into consent settlements, or, at a minimum, greatly prolong the settlement negotiations and litigation. Congress should be extremely wary of hampering the Government's ability to obtain settlements because such a result will thwart the goal of maximizing Governmental enforcement resources.

³¹ ATRR No. 558, A-17, Apr. 11, 1972; Mr. Kramer expressed approval of the proposal requiring disclosure of *ex parte* meetings or conversations between defendants and White House staff, observing that, "It would be difficult for me to image a situation where a member of the White House staff has a legitimate interest in communicating with a representative of a defendant in an antitrust case if the conversation relates to the case."

³² 118 Cong. Rec. S15553 (daily ed. Sept. 21, 1972) (remarks of Senator Tunney).

B. INCREASED CRIMINAL PENALTIES

Section 3 of the Tunney bill increases the maximum criminal fine for violating Sections 1, 2 and 3 of the Sherman Act from the present \$50,000³³ to \$500,000 for corporations and to \$100,000 for individuals. This tenfold increase in corporate maximum fines and the doubling of individual maximums are of such a magnitude as to merit a close analysis of the entire subject of criminal antitrust penalties.

Some of this ground has been plowed before. In 1955 the Attorney General's Report wrestled with suggested increases in criminal penalties.³⁴ The majority of the committee favored increasing the maximum from \$5,000 to \$10,000. Shortly afterwards, Congress set the limit at \$50,000 for Sherman Act violations.³⁵

In 1955 it was argued, as it may be today, that the criminal indictment itself is the single most important deterrent to illegal conduct under the antitrust laws. On the other hand, it was pointed out that criminal fines are not deductible as business expenses by either individuals or corporations. With high income tax rates, such fines may constitute severe penalties.

Criminal violations of the Sherman Act,³⁶ the Wilson Tariff Act,³⁷ Section 14 of the Clayton Act,³⁸ and Section 3 of the Clayton Act,³⁹ are classified as misdemeanors. Anomalously, the bill does not propose any change in the \$5,000 maximum fines for violations of the Wilson Tariff Act (restraints of trade by importers), of Section 14 of the Clayton Act (criminal liability of directors, officers, or agents authorizing a corporation's violation of penal provisions of antitrust laws), or of Section 3 of the Robinson-Patman Act (discriminatory discounts, geographical price discrimination, sales at unreasonably low prices, etc.). Before this disparity in penalties between the Sherman Act and its parallel criminal statutes is accentuated further at this time, the reasons for such a move should be clearly stated. Perhaps the question has not been considered, but this growing disparity is enough to raise doubts as to reasonableness of either the higher or, on the other hand, the lower, maximum.

While wide differences in the criminality of conduct obviously exist, there are some challenging comparisons. Under the Federal Penal Code (18 U.S.C. § 1, *et seq.*), and in one instance, the Internal Revenue Code (26 U.S.C. § 1, *et seq.*), maximum fines for the *felonies* specified below are as follows:

(a) Arson imperiling life (§ 81)-----	\$5, 000. 00
(b) Conspiracy to defraud the Government by making false claims (§ 286) -----	10, 000. 00
(c) Forgery or counterfeiting of notes, bonds, etc. (§ 493)-----	10, 000. 00
(d) Extortion by threat to kidnap or injure a person (§ 875)-----	5, 000. 00
(e) Attempts to influence witness or juror by corruption, threat or force (§ 1503)-----	5, 000. 00
(f) Plunder of a distressed vessel (§ 1658)-----	5, 000. 00
(g) Increasing compensation of railroad carrier by increasing weight of mail (§ 1728)-----	20, 000. 00
(h) Assault on the President of the United States (§ 1751)-----	10, 000. 00
(i) Racketeering (§ 1951)-----	10, 000. 00
(j) Destruction of public records (§ 2071)-----	2, 000. 00
(k) Attempt to evade or defeat a Federal tax (Int. Rev. C. § 7201)---	10, 000. 00

What is coming to the surface is the fact that the Tunney bill, through maximum fines of \$500,000 for corporations and \$100,000 for individuals, is, in essence, treating violations of the Sherman Act as something akin to, or even more serious than, major felonies, while technically the crime remains a misdemeanor because the maximum term for imprisonment remains at one year.⁴⁰

Inherent in the bill are changes in kind so substantial as really to remove these crimes from the misdemeanor class. Before this policy decision is made,

³³ The fine was \$5,000 until 1955. Report of the Attorney General's National Committee to Study the Antitrust Laws 352-53 (Mar. 31, 1955).

³⁴ *Id.*

³⁵ 69 Stat. 282, C. 281, July 7, 1955, amending 15 U.S.C. §§ 1, 2, and 3 (1890).

³⁶ 15 U.S.C. §§ 1-7 (1890).

³⁷ 15 U.S.C. §§ 8-11 (1894).

³⁸ 15 U.S.C. § 24 (1914).

³⁹ 15 U.S.C. § 13a (1936).

⁴⁰ The Federal Penal Code classifies a crime as a misdemeanor if imprisonment therefor cannot exceed one year, 18 U.S.C. § 1.

it should be considered that pension funds, charitable institutions and colleges are among the principal parties who would suffer from the imposition of the severe, non-tax deductible \$500,000 penalty. With the individual penalties going to \$100,000, comparison with similar, and perhaps even more heinous crimes, makes the latter fall to insignificance. Moreover, none of these considerations include the further uniquely severe penalties which may be visited upon innocent investors and others through treble damage actions.

In testimony on March 4, 1970, to the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, Walker B. Comegys, Esquire, then the Deputy Assistant Attorney General, articulated well the case for increasing the corporate fine from \$50,000 to \$500,000. Mr. Comegys stated one of the most forceful arguments favoring the increase as follows:

By current economic standards, the comparatively moderate corporate fine does not deter criminal conduct as effectively as it should.

In typical corporate hierarchies, middle management is under constant pressure from the top to produce. Unfortunately our experience has been that, under this pressure, some middle management succumb to hard-core antitrust violations, notwithstanding the substantial risk of personal indictment.

The much publicized electrical cases of 1960 involved indictments of relatively high-level middle management and the imposition of corporate fines at the present maximum rate. But notwithstanding this landmark criminal prosecution, large knowledgeable corporations have continued to engage in hard-core violations of the antitrust laws. While top management may be personally insulated from the hurly burly of hard-core violation, it has a direct concern with the financial well-being of the corporation. Increasing the maximum fine imposed on the corporation from \$50,000 to \$500,000 should insure that top management is as concerned with middle management antitrust compliance as it is with middle management performance. It should also help to insure that the corporation does not, after all, profit by antitrust violation.

During the past few years, several individuals have announced support for increasing the Sherman Act limitations on criminal fines. Support has come from former Representative Emanuel Celler (D-N.Y.), Senator Philip A. Hart (D-Mich.), Senator Roman L. Hruska (R-Nebr.), Senator Gurney, and former Attorney General Mitchell.

In the last analysis, if the major thrust of antitrust is thought to rest on the criminal side of the ledger, it may well be that the courts should be encouraged to impose longer prison sentences, with greater frequency upon individual violators, without whose acts there could be no crimes.

C. REFORM OF EXPEDITING ACT RE APPEALS

Section 4 of S. 782 amends the Expediting Act.⁴¹ In essence, the proposed amendment eliminates direct appeal to the Supreme Court of antitrust civil actions brought by the Government and substitutes intermediate appellate review of all such cases except those of general public importance. The amendment further authorizes the Government to appeal to the courts of appeals when a district court denies a preliminary injunction. Appellate decisions on interlocutory appeals are subject to Supreme Court review upon grant of a writ of certiorari. Finally, section 4 eliminates three-judge district court panels in civil actions brought by the Government under the Sherman Act, Clayton Act or certain sections of the Interstate Commerce Act.

Reform of the Expediting Act has been the subject of much study, review and comment in recent years. In 1963 the Supreme Court, speaking through Mr. Justice Clark, criticized that portion of the Expediting Act providing for direct appeal to the Supreme Court from the trial courts in Government civil antitrust actions, observing that, "Direct appeals not only place a great burden on the [Supreme] Court but also deprive us of the valuable assistance of the Court of Appeals."⁴²

Responding to the Supreme Court's complaint, the Attorney General in 1963 proposed legislation establishing the courts of appeals as the normal appellate channel for Government civil cases unless the case were of general public im-

⁴¹ Act of February 11, 1903, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 28 (1972); 49 U.S.C. § 44 (1972).

⁴² *United States v. Singer Manufacturing Co.*, 374 U.S. 175, n. 1, (1963).

portance.⁴³ In the same year, the American Bar Association, upon the recommendation of the Section on Antitrust Law, supported a rival bill⁴⁴ which restored the courts of appeals as the normal appellate channel but emphasized that expedited certiorari procedure was available. Later that year, the Judicial Conference disapproved the ABA-sponsored bill and approved the Justice Department's measure with an amendment eliminating the right of the Attorney General to file a certificate without obtaining leave of court.⁴⁵ The ABA position on amendments to the Expediting Act is summarized well in Hon. Richard W. McLaren's "Report From The House Of Delegates On Proposals . . . To Amend The Expediting Act". A copy of this report is attached hereto for the information of the Council.

Since 1963, numerous other bills designed to replace direct Supreme Court review of Government antitrust actions with appellate review have been introduced.⁴⁶

In the 91st Congress, a bill amending the Expediting Act along the lines envisaged in the Tunney bill passed both the House⁴⁷ and the Senate.⁴⁸ In hearings⁴⁹ on those bills, the Justice Department endorsed each of the proposals now contained in the Tunney bill.⁵⁰

The language contained in Section 4 of S. 782 is nearly identical with the language of H.R. 12807, which passed both Houses of Congress in 1970, but failed to be reported from a conference committee. For the information of Council, attached hereto is the text of H.R. 12807 as well as the Senate report on the bill.⁵¹

In the past, one of the staunchest congressional foes⁵² to amendment of the Expediting Act has been former Congressman Emmanuel Celler (D-N.Y.). Since Mr. Celler was defeated in his 1972 bid for renomination by the Democratic Party, he is no longer chairman of the House Committee on Judiciary, the body which reviews bills pertaining to the Expediting Act. With Mr. Celler absent from the legislative arena, perhaps the prospects may be brighter for actual enactment of a reform of the Expediting Act.

This report does not attempt to repeat the pros and cons regarding reform of the Expediting Act. Those arguments are fully presented in the texts of the documents cited in footnotes 51 and 52 of this report. At this juncture, suffice it to say that the stage appears to be ready for Congress to enact much-desired reforms of the Expediting Act. The Council and the American Bar Association should be well aware of the opportunity and challenge at hand.

Part III—Observations and Recommendations

The following are observations and recommendations concerning the three major sections of S. 782.

A. CONSENT DECREES

Informed citizen comment on antitrust consent judgments is welcomed under present procedures. Informal methods for obtaining such observations without

⁴³ S. 1892, 88th Cong., 1st sess. (1963).

⁴⁴ S. 1811, 88th Cong., 1st sess. (1963).

⁴⁵ 25 A.B.A. Antitrust Section 249 (1964).

⁴⁶ See, e.g., H.R. 12790, 91st Cong., 1st sess. (1970); S. 2612, 91st Cong., 1st sess. (1970); S. 1566, 91st Cong., 1st sess. (1969); H.R. 16810, 90th Cong., 2d sess. (1968); S. 2721, 90th Cong., 1st sess. (1967); and S. 2806, 2807, 2808, 2809, 2810, 2811 and 2812, 90th Cong., 1st sess. (1967).

⁴⁷ On May 19, 1970, Subcommittee No. 5 of the House Committee on Judiciary approved H.R. 12807, which was reported on May 27, 1970 (H.R. Rept. No. 91-1129). H.R. 12807 passed the House on July 6, 1970. The House appointed conferees on November 19, 1970.

⁴⁸ On May 19, 1970, the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary approved H.R. 12807. H.R. 12807, which was reported on September 21, 1970 (S. Rept. No. 91-1214), passed the Senate on September 25, 1970. The Senate appointed conferees on December 8, 1970.

⁴⁹ Hearings on S. 2721 and S. 2806-2812 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 90th Cong., 2d sess. (April —).

⁵⁰ 118 Cong. Rec. S. 15556 (daily ed. Sept. 21, 1972) (remarks of Senator Tunney).

⁵¹ For further comment on amending the Expediting Act, see, McLaren, *Recent Cases, Current Enforcement Views, and Possible New Antitrust Legislation*, 38 A.B.A. Antitrust L.J. 211, 213 (1969); *Behind The Scenes With Congressional Committees*, 38 A.B.A. Antitrust L.J. 226, 250-1 (1969); Arnold, *The Supreme Court and the Antitrust Laws 1953-67*, 34 A.B.A. Antitrust L.J. 2, 10-17 (1967); *Panel Discussion*, 34 A.B.A. Antitrust L.J. 51, 77-81 (1967); note, *The Antitrust Expediting Act—A Critical Reappraisal*, 63 Mich. L. Rev. 1240 (1965); and Gesell, *A Much Needed Reform—Repeal The Expediting Act For Antitrust Cases*, 1961 Antitrust L. Sum. 98 (1961).

⁵² See, Celler, *Case in Support of Application of the Expediting Act to Antitrust Suits*, 14 DePaul L. Rev. 29 (1964).

"overloading" the machinery are usually available to the Justice Department and the courts. The current practice of the Justice Department to file consent decrees 30 days before entry, to issue press releases announcing such agreements and to seek informed, non-party comment strikes a fair balance.

Citizen participation in general governmental processes is a worthy goal, but the highly complex and specialized field of antitrust settlements is scarcely an area for prolonged or deeply engaged lay participation. Throughout Government antitrust litigation, both plaintiff and defendant are normally represented by expert counsel who are vigorous, effective representatives for their respective sides. When these counsel decide to settle an antitrust action by a consent decree, they do so only after the most serious and intensive assessments and negotiations. The procedures and outsider participation proposed by the Tunney bill in the consent decree section of S. 782 come into play only after a consent decree has been fashioned through deliberate and intensive negotiations. Little justification has been shown to demonstrate the need for burdening governmental enforcement officials with the preparation of the mandatory public impact statements as well as responses to comments. Reported cases indicate, however, that the present procedures work quite well. Yet the bill simply assumes that the present Justice Department practice of filing decrees for comment for 30 days before entry is inadequate and needs to be remedied by a new, mechanized, procedural labyrinth.

The broad intervention and non-party participation provisions of the bill should be closely scrutinized. Since they single out for scrutinizing review proposed settlements of Government antitrust cases only, they tend to build into the law a new policy placing *antitrust* consent decrees in a disfavored position.

The havoc which would be created by large-scale public participation, of course, is not subject to precise measurement, but it would be considerable. It would work directly against the policy ingrained in the law strongly favoring settlements negotiated by lawyers for both sides.

Meanwhile, any person injured by an antitrust violation retains the powerful treble damage weapon, often augmented by the threat of a class action. Here is another factor militating against outside participation in the settlement of Government antitrust suits.

On the basis of the foregoing considerations, it is therefore recommended that the provisions of Section 2 of S. 782 be formally opposed and that the recommendation be made that Congress not pass such legislative proposal.

B. CRIMINAL PENALTIES

With regard to the increased monetary penalties envisaged under Section 3 of S. 782, it is observed that an increase of corporate fines from \$50,000 to \$500,000 might tend to cause top corporate management to pay greater heed to antitrust compliance by middle corporate management. Consistent with the position previously taken by the Section of Antitrust Law, it is recommended that this portion of the proposal be supported.

On the other hand, it is recommended that the maximum fine to be imposed upon individuals remain at \$50,000. The most effective deterrent on the misdemeanor side of antitrust law may be the fact of indictment itself and the possibility of prison sentence imposed upon an actual individual causing the infraction. It seems unlikely that monetary fines ever will have the same deterrent effect as imprisonment.

C. EXPEDITING ACT REFORM

In practice, the requirement that three judges sit on a panel to hear antitrust cases brought by the Government has resulted in great burdens on the judiciary, and judicial talents and time have been wasted when three judges must sit to do the job which one alone could perform adequately.

Nearly uniform comment has supported reform of the Expediting Act so that appeals from district courts in cases brought by the United States for equitable relief shall be to the courts of appeal rather than directly to the United States Supreme Court. Further, nearly unanimous support is found for the proposition that appeals from final judgments in such cases may be direct to the Supreme Court if it is determined that the case is of general public importance.

In view of the overwhelming commentary favoring reform of the Expediting Act as well as the 1963 American Bar Association's resolution on the proposal, it

is recommended that the general goals contained in Section 4 of S. 782 be supported and that steps be taken to insure that reform of the Expediting Act be enacted by the Congress of the United States.

APPENDIX "A"

On February 20, 1973, after a thorough review and discussion upon the foregoing report, the Council of the Section of Antitrust Law unanimously* adopted the following resolution concerning S. 782:

Resolved: That the Section of Antitrust Law of the American Bar Association opposes the enactment of that part of the proposed "Antitrust Procedures and Penalties Act" (S. 782) which would substantially alter antitrust consent judgment procedures; and that among the reasons why the proposed legislation should not be enacted are the following:

1. It fails to recognize that, in fact, present Justice Department procedures (Title 28 Code of Federal Regulations, Part 50.1) for the settlement of civil antitrust cases provide for widespread notice to the public, invite the views of interested persons, and provide for court hearings for the fair development of the issues on whether or not consent decrees should be entered, without the wasteful procedures inherent in the proposed legislation;

2. It would be harmful as tending to encumber and complicate the procedures for negotiation and entry of antitrust consent decrees, which constitute the great bulk of civil antitrust enforcement by the Government;

3. It would have a chilling effect upon the ability of the Government to obtain antitrust consent decrees, resulting in an unfortunate curtailment in this method of effectively terminating litigation;

4. It would create ambiguous and difficult situations respecting the status of third persons attempting to intervene in antitrust settlements.

Further resolved: That the Section of Antitrust Law of the American Bar Association supports enactment of that part of the bill increasing the maximum monetary limit to \$500,000 for criminal penalties for certain antitrust violations by corporations, but opposes increased penalty limits for individuals.

And further resolved: That, in line with the Section's action on previous occasions, the Section of Antitrust Law of the American Bar Association supports that part of the bill amending the Expediting Act.

[S. 782, 93d Cong., 1st sess.]

A BILL To amend the antitrust laws of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedures and Penalties Act".

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 16), is amended by redesignating subsection (b) as (h) and by inserting after subsection (a) the following:

"(b) Any consent judgment proposed by the United States for entry in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which that proceeding is pending and published in the Federal Register at least sixty days prior to the effective date of such decree. Simultaneously with the filing of the proposed consent judgment, unless otherwise instructed by the court, the United States shall file with the district court, cause to be published in the Federal Register and thereafter furnish to any person upon request a public impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposed judgment, relief to be obtained thereby, and the anticipated effects on competition of that relief, including

*Miles Kirkpatrick abstained.

an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the proposed judgment is entered;

"(5) a description of the procedures available for modification of the proposed judgment;

"(6) a description and evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives.

"(c) During the sixty-day period provided above, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposed consent judgment. The Attorney General or his designate shall establish procedures to carry out the provisions of this subsection, but the sixty-day time period set forth herein shall not be shortened except by order of the district court upon a showing that extraordinary circumstances require such shortening and that such shortening of the time period is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(d) Before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of that judgment is in the public interest. For the purpose of this determination, the court shall consider—

"(1) the public impact of the judgment, including termination of alleged violation, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies, and any other considerations bearing upon the adequacy of the judgment;

"(2) the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit to be derived from a determination of the issues at trial.

"(e) In making its determination under subsection (d), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master, pursuant to rule 53 of the Federal Rules of Civil Procedure, and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual group or agency of government with respect to any aspect of the proposed judgment of the effect thereof in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance *amicus curiae*, intervention as a party pursuant to rule 24 of the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments or objections concerning the proposed judgment filed with the United States under subsection (c) and the response of the United States to such comments or objections;

"(5) take such other action in the public interest as the court may deem appropriate.

"(f) Not later than ten days following the filing of any proposed consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any officer, director, employee, or agent thereof, or other person except counsel of record, with any officer or employee of the United States concerning or relevant to the proposed consent judgment. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this section have been complied with and that such filing is a true and complete description of such communications.

"(g) Proceedings before the district court under subsections (d) and (e), and public impact statements filed under subsection (b) hereof, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States

under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding."

PENALTIES

SEC. 3. Sections 1, 2, and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (26 Stat. 209; 15 U.S.C. 1, 2, and 3) are each amended by striking out "fifty thousand dollars" and inserting "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars".

EXPEDITING ACT REVISIONS

SEC. 4. Section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of a general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."

SEC. 5. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

"(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

"(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if—

"(1) upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the Administration of justice; or

"(2) the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice; or

"(3) the district judge who adjudicated the case, sua sponte, enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

A court order pursuant to (1) or (3) or a certificate pursuant to (2) must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

SEC. 6. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) The proviso in section 3 of the Act of February 19, 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43), is repealed and the colon preceding it is changed to a period.

SEC. 7. The amendment made by section 2 of this Act shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

[From the Congressional Record, Feb. 6, 1973]

SENATE

By Mr. TUNNEY (for himself and Mr. GURNEY) :

S. 782. A bill to amend the antitrust laws of the United States, and for other purposes. Referred to the Committee on the Judiciary.

THE ANTITRUST PROCEDURES AND PENALTIES ACT

Mr. TUNNEY. Mr. President, on behalf of the distinguished Senator from Florida (Mr. GURNEY) and myself, I am pleased to introduce S. 782, the Antitrust Procedures and Penalties Act. Senator GURNEY and I introduced this legislation last session, as S. 4014, but it was introduced so late in the session that it was impractical for the Antitrust and Monopoly Legislation Subcommittee to hold hearings on it.

Accordingly we are introducing the legislation early in this session with a view toward hearings which will be held on March 14, 15, and 16, 1973.

Because I described the legislation fully when we introduced it on September 21, 1972, I ask unanimous consent that, in lieu of an additional statement at this time, a copy of the bill, a section-by-section analysis, and my introductory remarks of last September, be printed at this point in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows :

S. 782

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedures and Penalties Act."

CONSENT DECREE PROCEDURES

SEC. 2. Section 5 of the Act entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 16) is amended by redesignating subsection (b) as (h) and by inserting after subsection (a) the following :

"(b) Any consent judgment proposed by the United States for entry in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which that proceeding is pending and published in the Federal Register at least 60 days prior to the effective date of such decree. Simultaneously with the filing of the proposed consent judgment, unless otherwise instructed by the court, the United States shall file with the district court, cause to be published in the Federal Register and thereafter furnish to any person upon request a public impact statement which shall recite :

"(1) the nature and purpose of the proceeding ;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws ;

"(3) an explanation of the proposed judgment, relief to be obtained thereby, and the anticipated effects on competition of that relief, including an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein ;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the proposed judgment is entered :

"(5) a description of the procedures available for modification of the proposed judgment;

"(6) a description and evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives.

"(c) During the 60-day period provided above, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposed consent judgment. The Attorney General or his designate shall establish procedures to carry out the provisions of this subsection, but the 60-day time period set forth herein shall not be shortened except by order of the district court upon a showing that extraordinary circumstances require such shortening and that such shortenings of the time period is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(d) Before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of that judgment is in the public interest. For the purpose of this determination, the court shall consider:

"(1) the public impact of the judgment, including termination of alleged violation, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies, and any other considerations bearing upon the adequacy the judgment;

"(2) the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefits to be derived from a determination of the issues at trial.

"(e) In making its determination under subsection (d), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participants or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master, pursuant to rule 53 of the Federal Rules of Civil Procedure, and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of an individual group or agency of government with respect to any aspect of the proposed judgment of the effect thereof in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance *amicus curiae*, intervention as a party pursuant to rule 24 of the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments or objections concerning the proposed judgment filed with the United States under subsection (c) and the response of the United States to such comments or objections;

"(5) take such other action in the public interest as the court may deem appropriate.

"(f) Not later than 10 days following the filing of any proposed consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communication by or on behalf of such defendant, including any officer, director, employee, or agent thereof, or other person except counsel of record, with any officer or employee of the United States concerning or relevant to the proposed consent judgment.

Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this section have been complied with and that such filing is a true and complete description of such such communications.

"(g) Proceedings before the district court under subsections (d) and (e), and public impact statements filed under subsection (b) hereof, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for its the introduction of the consent judgment as *prima facie* evidence against such defendant in any such action or proceeding."

PENALTIES

SEC. 3. Sections 1, 2, and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (26 Stat. 209; 15 U.S.C. 1, 2, and 3) are each amended by striking out "fifty thousand dollars" and inserting "five hundred thousand dollars if a corporation, or, if any other person, one hundred thousand dollars."

EXPEDITING ACT REVISIONS

SEC. 4. Section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the court, prior to the entry of final judgment, a certificate that, in his opinion, the case is of a general public importance. Upon filing of such certificate, it shall be the duty of the judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited."

SEC. 5. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

"(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, or any other Acts have like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to section 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a) (1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.

"(b) An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if:

"(1) upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the Administration of justice; or

"(2) the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice; or

"(3) the district judge who adjudicated the case, sua sponte, enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice."

"A court order pursuant to (1) or (3) or a certificate pursuant to (2) must be filed within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

SEC. 6. (a) Section 401(d) of the Communications Act of 1934 (47 U.S.C. 401(d)) is repealed.

(b) The proviso in section 3 of the Act of February 19, 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43), is repealed and the colon preceding it is changed to a period.

SEC. 7. The amendment made by section 2 of this Act shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

ANTITRUST PROCEDURES AND PENALTIES ACT—SECTION-BY-SECTION ANALYSIS

Sec. 1. Short Title

The Act may be cited as "The Antitrust Procedures and Penalties Act."

Sec. 2. Consent Decree Procedures

Section 2 adds a series of new subsections to Section 5 of the Clayton Act (15 USC § 16) to establish procedures governing the filing and entry of a consent judgment settling a civil antitrust suit by the United States. These new subsections, numbered "(b)-(g)" are inserted after the present subsection "(a)" in Section 5 of the Clayton Act.

SUBSECTION (B)—PUBLIC IMPACT STATEMENT

This subsection provides that any consent decree proposed by the United States must be filed with the court in which the case is pending and simultaneously published in the Federal Register at least 50 days prior to the effective date of the decree. In addition the Government must file a "public impact statement" containing the following:

(1) the nature and purpose of the proceeding;

The description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposed judgment, the relief to be obtained thereby, the anticipated effects on competition of that relief and an explanation of any special circumstances giving rise to the proposed judgment or any provision contained therein;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the judgment is entered;

(5) a description of the procedures available for modification of the judgment;

(6) a description and evaluation of alternatives to the proposed judgment and the anticipated effects on competition of such alternatives.

The public impact statement required by this subsection is analogous to the environmental impact statement presently required from governmental agencies by the National Environmental Policy Act.

SUBSECTION (C)—PROCEDURES FOR PUBLIC COMMENT AND DEPARTMENTAL RESPONSE

This subsection lengthens the present 30-day public comment period to 60 days. It also provides that the sixty-day period may be shortened by order of court but only upon a showing that extraordinary circumstances require it and that such a shortened time period would not be adverse to the public interest.

An additional requirement contained in this subsection is a filing by the Justice Department of a formal response to comments submitted to it pursuant to this provision. This requirement has two purposes: first, to give some assurance that public comments will in fact be considered by the Department when received; and second, to provide additional data to the district court in making its decision whether to enter the decree.

SUBSECTION (D)—ENTRY OF THE DECREE

This subsection establishes the general criteria by which the court should determine whether to enter a particular decree.

The mandate is phrased first in general terms: Before entering any consent judgment, the court shall determine that entry of that judgment is in the public interest.

In addition, however, and as an aid to the court in making its independent judgment, the bill provides a number of more detailed criteria for determination of the public's interest. Those criteria are as follows:

(1) the public impact of the judgment, including termination of alleged violation, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies, and any other considerations bearing upon the adequacy of the judgment; and

(2) the public impact of entry of the judgment upon the public generally and persons alleging specific injury from the violations set forth in the complaint; including consideration of the public benefit to be derived from a determination of the issues at trial.

SUBSECTION (E)—PROCEDURES AVAILABLE TO THE COURT

This subsection adds a series of discretionary procedural devices to assist the court in making the determination of public interest required by the Act. Those procedures are as follows:

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspect of the proposed judgment or the effect thereof in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies; including appearance *amicus curiae*, intervention as a party pursuant to Rule 24 of the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments or objections concerning the proposed decree filed with the United States under subsection (c) and the response of the United States to such comments or objections;

(5) take such other action in the public interest as the court may deem appropriate.

SUBSECTION (F)—RECORD OF LOBBYING ACTIVITIES

This subsection provides that not later than 10 days following the filing of any proposed consent judgment as required by the bill each defendant must file with the district court a description of any and all written or oral communications by or on behalf of the defendant with any officer or employee of the United States concerning or relevant to the consent judgment or the subject matter thereof. Included under this provision are contacts on behalf of a defendant by any of its officers, directors, employees or agents, or any other person acting on behalf of the defendant, with any federal official or employee. Thus, for example, the provision would include contacts with Members of Congress or staff, Cabinet officials, staff members of executive departments and White House staff.

The only exception is a limited exception for attorneys representing the defendant who are of record in the judicial proceeding. The exception is designed so as to avoid interference with legitimate settlement negotiations between attorneys representing a defendant and Justice Department attorneys handling the litigation. However, the provision is not intended as a loophole for extensive lobbying activities by a horde of "counsel of record."

In addition, the subsection requires that prior to entry of the consent judgment by the court, each defendant must certify to the court that the requirements of the section have been complied with and that the filing is a true and complete description of all such contacts or communications.

SUBSECTION (G)—PRIMA FACIE EFFECT

A final provision in the consent decree procedures retains the provision presently contained in Section 5 of the Clayton Act which prevents use of a consent decree in any way in subsequent litigation as *prima facie* evidence of violation. A new subsection (g) would be added which provides that proceedings before the district court in connection with the decree pursuant to this Act and public impact statements filed pursuant to the act are not admissible against any defendant in any action or proceeding brought by any other party against that

defendent under the antitrust laws or by the United States under Section 4A of the Clayton Act, nor constitute a basis for introduction of the decree as prima facie evidence against such defendant in any such action or proceeding.

The basic reason for including this provision is to preserve the consent decree as a substantial enforcement tool by declining to give it prima facie effect as a matter of law.

SECTION 3. CRIMINAL PENALTIES

This section increases the penalties for criminal violations of the antitrust laws from \$50,000 to \$100,000 for individuals and \$500,000 for corporations.

SECTIONS 4-7. EXPEDITING ACT REVISIONS

These sections incorporate revisions of the Expediting Act which previously placed both House and Senate in the 91st Congress. They provide for intermediate appellate review of antitrust cases, with direct appeal to the Supreme Court retained for cases of general public importance. In addition, the present uncertainty regarding the opportunity for appeal by the Government from a denial of a preliminary injunction by a district court is resolved by allowing such appeals.

REMARKS BY MR. TUNNEY

Mr. President, we have learned a great deal about the importance of the Nation's antitrust laws in recent months and in particular about the manner in which they are administered. Two recent books, Morton Mintz and Jerry Cohen's "America, Inc." and the Ralph Nader study group's "The Closed Enterprise System," have focused with remarkable clarity upon the impact of economic concentration on the everyday lives of American citizens.

Combined with the Judiciary Committee's recent hearings, these events have crystallized the rather vague concept of antitrust into a very tangible reality.

Perhaps for the first time since the now famous electric company price-fixing cases in the 1950's, public attention has been focused in a very direct and emphatic way upon the administration of the Nation's antitrust laws. Concern has been renewed about the standards and the safeguards which apply when the stakes are high.

That concern is not limited to any one party or one administration. Confidence in the process by which public decisions are made is an issue in which every public official has very immediate investment. Moreover, it is an investment which must be shared with every member of the electorate. The disaffection which an increasing number of Americans have come to feel for their Government poses the gravest of threats to the delicate balance by which we all consent to be governed.

The problem is especially acute where the issue is antitrust because the stakes are high. Antitrust cases often carry with them profound implications not only for the particular defendants but for the millions of voiceless consumers with whom they deal. The decision to settle a case, and the components of that settlement, may affect the price, the quantity, and the quality of the most basic commodities. The elimination of several independent bakeries or dairies in a metropolitan area, for example, may have a very direct effect upon the cost of bread and milk to millions of families. Or the commodity might be drugs: For example, between 1953 and 1961, 100 tablets of the antibiotic tetracycline retailed for about \$51. Ten years later, after exposure of an illegal conspiracy which had set prices, the same quantity was approximately \$5, a 90-percent decrease.

In short, enforcement of the antitrust laws may have a very profound effect on the lives of every citizen of this country.

But beyond the economic effect, there is a political effect. Increasing concentration of economic power, such as has occurred in the flood of conglomerate mergers, carries with it a very tangible threat of concentration of political power. Put simply, the bigger the company, the greater the leverage it has in Washington. Bigness may not be bad in itself, but it carries with it a wide range of implications and consequences that must be examined very carefully.

We are not yet a corporate state but we may wish to decide whether we want to be before it happens by default.

All of these considerations point to the fact that the public has a direct and vital interest in effective enforcement of the antitrust laws, particularly in the process by which antitrust cases are resolved.

For these reasons I am today introducing S. 4014, the Antitrust Procedures and Penalties Act. I am pleased and honored to have my distinguished colleague on the Antitrust and Monopoly Subcommittee, Mr. Gurney, join me as a prime sponsor.

The bill which we are introducing today has three basic provisions. The first establishes a reasonable but specific set of standards and guidelines to govern the process by which antitrust suits may be settled and consent judgments entered. The second increases the penalties for criminal violations of the antitrust statutes. Finally, a third provision revises the Expediting Act to improve the process of appellate review of antitrust cases, and in particular to authorize the United States appeal from the denial of a preliminary injunction at the trial court level.

I. CONSENT DECREE PROCEDURES

By the most recent figures available, over 80 percent of the civil antitrust suits brought by the Justice Department and disposed of through consent decrees—voluntary settlements negotiated between defendants and the Government and adopted by the court prior to trial. Essentially the decree is a device by which the defendant, while refusing to admit guilt, agrees to modify its conduct and in some cases to accept certain remedies designed to correct the violation asserted by the Government.

The consent decree has a number of major public consequences, however. First, it means that the substantial resources of the Justice Department will be removed from the effort to establish that the antitrust laws were violated. Because consent decrees by statute carry with them no *prima facie* effect as an admission of guilt, private parties who may have been damaged by the alleged violations are left to their own resources in their efforts to recover damages. As a practical matter because of the protracted nature of antitrust litigation, and the deep pockets of many corporate defendants, few private plaintiffs are able to sustain a case in the absence of parallel litigation by the Justice Department.

In addition, however, the consequences to the public of the provisions contained in the decree itself may be of major significance. Depending upon the skill of the Justice Department's attorneys and opposing counsel, and the relative leverage which they can bring to bear, a bad or inadequate consent decree may as a practical matter foreclose further review of a defendant's practices both inside and outside the scope of the decree.

Similarly, where the decree establishes guidelines for future conduct, the enforcement and modification of those guidelines takes on even more importance.

Finally, the public's interest in deterrence of future antitrust violations by the defendant and by other potential defendants may be affected profoundly by the willingness of the Justice Department to settle cases and the price exacted for such settlements.

None of these points implies that settlement of an antitrust case should necessarily be discouraged. There is in fact little question that consent decrees have been a particularly valuable enforcement tool.

But because of the frequency of their use, because of the importance a particular decree may have, and because of importance of public confidence in the manner a decree is arrived at, I believe we must provide specific standards and procedures to assure that the decision to settle and the settlement itself are in fact in the public interest.

A. PUBLIC IMPACT STATEMENT

Section 2 of the bill adds a new subsection (b) to section 5 of the Clayton Act (15 U.S.C. S. 16). This new subsection provides that any consent decree proposed by the United States must be filed with the court in which the case is pending and simultaneously published in the Federal Register at least 60 days prior to the effective date of the decree. In addition, the Government must file a public impact statement containing the following:

First, the nature and purpose of the proceeding:

Second, a description of the practices or events giving rise to the alleged violation of the antitrust laws;

Third, an explanation of the proposed judgment, relief to be obtained thereby, and the anticipated effects on competition of that relief, including an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein;

Fourth, the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the proposed judgment is entered;

Fifth, a description of the procedures available for modification of the proposed judgment;

Sixth, a description and evaluation of alternatives to the proposed judgement and the anticipated effects on competition of such alternatives.

Each of these items is relatively self-explanatory. In sum, they have a dual purpose: first, they explain to the public, particularly those members of the public with a direct interest in the proceeding, the basic data about the decree to enable such persons to understand what is happening and make informed comments of objections to the proposed decree during the 60-day period. Second, the items listed in the subsection will serve to focus additional attention by both sides during settlement negotiations upon the factors which should be considered in formulating a decree.

The requirements of this provision are departures from the current practice of the Antitrust Division, but are not necessarily burdensome ones. At present, proposed consent decrees are filed with the court 30 days before they are to be entered. Typically the Department issues a brief press release recounting the fact of the filing of the decree and in some cases giving some additional but limited information about the litigation. Following the 30-day period during which public documents are received—but rarely solicited—the decree is entered by the court.

This new subsection lengthens the comment period to 60 days and provides for circulation of both the decree and an analysis of its public impact by publication in the Federal Register. In addition, an affirmative duty is placed upon the Department to provide copies of both upon request.

The public impact statement required by this section is analogous to the environmental impact statement presently required from governmental agencies by the National Environmental Protection Act. It is therefore not without precedent but rather reflects a continuing concern on the part of the Congress to assure that decisions having a major public impact be arrived at through procedures which take account of that impact.

In addition, the public impact statement will serve as the basis for vastly improving the quality of comments filed in response to the decree. In so doing, it may render more meaningful the period for public comment which exists in shorter form under present procedure. Given the enormous amount of time and resources devoted to the prosecution of most antitrust suits, it is both logical and necessary that the end result be as carefully considered as possible.

The significance of this latter point should not be overlooked. Regardless of the ability and negotiating skill of the Government's attorneys, they are neither omniscient nor infallible. The increasing expertise of so-called public interest advocates and for that matter the more immediate concern of a defendant's competitors, employees, or antitrust victims may well serve to provide additional data, analysis, or alternatives which could improve the outcome.

B. PROCEDURES FOR PUBLIC COMMENT AND DEPARTMENTAL RESPONSE

As explained above, the bill would lengthen the present 30-day public comment period to 60 days. A new subsection (c) would be added to section 5 of the Clayton Act which would require the Attorney General or his designee to establish procedures to carry out the provision for public comment on the decree. The bill also provides that the 60-day period may be shortened by order of court but only upon a showing that extraordinary circumstances require it and that such a shortened time period would not be adverse to the public interest.

An additional requirement contained in this subsection is the filing by the Justice Department of a formal response to comments submitted to it pursuant to this provision. This requirement has two purposes: First, to give some assurance that public comments will in fact be considered by the Department when received; and second, to provide additional data to the district court in making its decision whether to enter the decree.

This latter point is particularly important because of the historically limited role which the courts have played in scrutinizing consent decrees. Before a court can be expected to exercise an independent judgment with respect to the merits of a particular decree, it must have adequate information available to it.

The public impact statement required by the bill, and the departmental response to public comments, can provide significant contributions toward the adequacy of the data available to the court.

C. ENTRY OF THE DECREE

A new subsection (d) which the bill would add to section 5 of the Clayton Act establishes the general criteria by which the court should determine whether to enter a particular decree.

The mandate is phrased first in general terms: Before entering any consent judgment, the court shall determine that entry of that judgment is in the public interest.

The mandate is a highly significant one because it states as a matter of law that the role of the district court in a consent decree proceeding is an independent one. The court is not to operate simply as a rubber stamp, placing an imprimatur upon whatever is placed before it by the parties. Rather it has an independent duty to assure itself that entry of the decree will serve the interests of the public generally.

Though this may seem a truism to some, too often in the past district courts have viewed their rules as simply ministerial in nature—leaving to the Justice Department the role of determining the adequacy of the judgment from the public's view. While in most cases that judgment may be a reasonable one, there may well be occasions when it is not. Furthermore, the submission of the proposed decree to the court and its subsequent embodiment in a judgment lends a permanence that endures long after the passing of a particular administration of the Department.

For all of these reasons, the mandate placed upon the court by this section, even though a general one, carries with it a major significance.

In addition, however, and as an aid to the court in making its independent judgment, the bill provides a number of more detailed criteria for determination of the public's interest. Those criteria are as follows:

First, the public impact of the judgment, including termination of alleged violation, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies, and any other considerations bearing upon the adequacy of the judgment:

Second, the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaints including consideration of the public benefit to be derived from a determination of the issues at trial.

The thrust of those criteria is to demand that the court consider both the narrow and the broad impacts of the decree. Thus, in addition to weighing the merits of the decree from the viewpoint of the relief obtained thereby and its adequacy, the court is directed to give consideration to the relative merits of other alternatives and specifically to the effect of entry of the decree upon private parties aggrieved by the alleged violations and upon the enforcement of the antitrust laws generally.

These latter two points merit some additional explanation. First, as is well known by the antitrust bar, in the vast majority of cases, the Government is the only plaintiff with resources adequate to the task of protracted antitrust litigation. Thus, a major effort of defense counsel in any antitrust case is to neutralize the Government as plaintiff and leave prospective private plaintiffs to their own resources. Consent decrees have that effect because of statute they cannot be used as *prima facie* evidence of a violation in subsequent suits by private plaintiffs.

Thus, removal of the Government as plaintiff through entry of a consent decree has a profound impact upon the ability of private parties to recover for antitrust injuries. Such a result is by no means improper nor perhaps in every case unreasonable. But because of that impact, it is a factor which should enter into the calculus by which the merits of the decree are assessed. It may well be that the economic cost to the public of a particular antitrust violation merits the application of governmental resources toward gaining a recovery of that cost in damages for those who can establish their injury.

Similarly, the court is instructed to look at the question of antitrust enforcement generally to determine whether there may be overriding public interest in denying a particular settlement or even forcing a trial on the merits. For example, it may be that a particular case presents issues which demand an outcome which carries value as precedent. Such considerations would thus be added to the guides by which the court would arrive at its decision.

D. PROCEDURES AVAILABLE TO THE COURT

To assist the court in making the determination of public interest required by the bill, a variety of discretionary procedural devices are provided in a new subsection (e). Those procedures are as follows:

First, take testimony of government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate:

Second, appoint a special master pursuant to rule 53 of the Federal Rules of Civil Procedure, and such outside consultants or expert witnesses as the court may deem appropriate, and request and obtain the views, evaluations or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect thereof in such manner as the court deems appropriate;

Third, authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae intervention as a party pursuant to rule 24 of the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

Fourth, review any comments or objections concerning the proposed decree filed with the United States under subsection (c) and the response of the United States to such comments or objections:

Fifth, take such other action in the public interest as the court may deem appropriate.

A few key factors should be mentioned. First, all of the procedural devices continued in this subsection are discretionary in nature. They are tools available to the district court for its use, but use of a particular procedure is not required.

The decision to make those procedures discretionary is dictated by a desire to avoid needlessly complicating the consent decree process. There are some cases in which none of these procedures may be needed. On the other hand, there have been and will continue to be cases where the use of many or even all of them may be necessary. In fact, in a very few complex cases, failure to use some of the procedures might give rise to an indication that the district court had failed to exercise its discretion properly.

Second, the procedures are not meant to be exclusive. Rather, they are designed as guides for the courts to follow. To a considerable extent, they serve as safe harbors for a court to look to when faced with a difficult case. By following one or more of the procedures contained in this provision, an individual judge can develop the data he needs without fear that he is embarking upon an untried and perhaps reversible journey. This point is particularly significant where courts have been confronted in the past with the argument that any effort to make an independent examination of the decree is unprecedented.

Turning to the specific procedures provided by the bill, most are quite simple. The first two mechanisms, testimony of expert witnesses and special masters or other expert consultants, are designed to allow the court to obtain from whatever source necessary the technical expertise required to assess the merits of the decree or its consequences. This might include, for example, calling upon an economist from the Antitrust Division to explain the practices complained of and the effect of the relief sought. Or it might involve testimony from an expert obtained by the court from the SEC or some other Government agency. In a particularly complex case, it might include appointing one or more special masters or expert consultants to analyze and evaluate the decree or other arguments in its support. In short, the court would be authorized to obtain, from whatever source deemed appropriate, information sufficient to make an informed judgment about the decree.

In addition, the court may take appropriate measures to solicit comments on the decree from groups, agencies of government, or individual members of the public to assure itself that the decree has received adequate public attention.

While it seems clear that the court would have such authority in the absence of legislation, this provision like those discussed above serves to encourage such requests by removing any aura of extraordinariness.

A third provision outlines a variety of methods in which interested third parties may be authorized to participate in the proceedings. The thrust of this provision is broadly flexible. It ranges from full intervention as a party under rule 24 of the Federal Rules of Civil Procedure down through a wide variety of more limited forms of participation. The basic point, however, is that the court is given broad discretion to fashion the degree of participation necessary to assure an adequate airing of the merits of the decree. Thus, for example, it need not allow an intervenor to come in with all the rights of a party to the litigation, but can choose instead to confer more limited rights. The effect of this provision should be to allow more extensive participation by so-called public representation where useful or appropriate without needlessly complicating the entire litigation.

The fourth procedural mechanism deals with public comments other than through actual participation in the proceedings before the court. Thus public comments received during the 60-day period for such comments together with the Justice Department's response would be available to the court:

Finally, a blanket authorization for other appropriate procedures is included to encourage the court to fashion such additional tools as may be useful in fulfilling the mandate placed upon it to evaluate the proposed decree.

E. RECORD OF LOBBYING ACTIVITIES

One of the unfortunate lessons which the American people have learned in the past few months is that access to governmental institutions and governmental decisionmakers is inherently unequal. Large corporations and their officials can obtain a hearing at the highest levels of government on a scale that is beyond the imagination of the average citizen. This problem is not unique to the present administration, it is a fundamental reality of any administration. And it will continue to be a problem as long as we continue to finance political campaigns by watering at the big money trough.

But having said that, we must also assure that adequate safeguards govern the manner and extent of corporate influence.

The problem is particularly critical where the antitrust laws are concerned because to a considerable extent those laws are viewed as a direct threat by those who exercise the greatest corporate influence. And because the stakes are high the level of lobbying is equally high.

For this reason, it is particularly important to assure some measure of public scrutiny of the exercise of that influence. Justice Brandeis once said, "Sunlight is the best of disinfectants." And it is sunlight which is required in the case of lobbying activities attempting to influence the enforcement of the antitrust laws.

To deal with this problem in a constructive way, the bill proposes a new provision in the Clayton Act which would require a disclosure of lobbying activities on behalf of any defendant in connection with a consent decree proceeding.

The bill adds a new subsection (f) which provides that not later than 10 days following the filing of any proposed consent judgement as required by the bill each defendant must file with the district court a description of any and all written or oral communications by or on behalf of that defendant with any officer or employee of the United States concerning or relevant to the consent judgment or the subject matter thereof. Included under this provision are contacts on behalf of a defendant by any of its officers, directors, employees or agents or any other person acting on behalf of the defendant, with any Federal official or employee. Thus, for example, the provision would include contacts with Members of Congress or staff, Cabinet officials, staff members of executive departments and White House staff.

The only exception is a limited exception for attorneys representing the defendant who are of record in the judicial proceeding. The exception is designed to avoid interference with legitimate settlement negotiations between attorneys representing a defendant and Justice Department attorneys handling the litigation. However, the provision is not intended as a loophole for extensive lobbying activities by a horde of "counsel of record."

In operation, the provision would require disclosure, for example, of a meeting between a corporate official and a Cabinet officer discussing "antitrust policy"

during the pendency of antitrust litigation against that corporation. The disclosure intended is a disclosure of the fact of the meeting and the general subject matter. It obviously does not envision an outline of the conversation. But the essential data, that is, the date, the participants, and the fact that antitrust matters were discussed must be disclosed.

In addition, the bill requires that prior to entry of the counsel judgment by the court, each defendant must certify to the court that the requirements of the section have been complied with and that the filing is a true and complete description of all such contracts or communications.

The requirements of this section are by no means burdensome. They demand no extraordinary efforts on the part of any defendant in order to comply with the duties imposed in the section.

Furthermore, they apply equally to contact with any branch of Government, including the Congress. I believe it is important that we in the Congress accept the same scrutiny as we would impose on any other branch. Furthermore, I believe there is a great deal to be gained by having a corporate official who seeks to influence a pending antitrust case through congressional pressure, know that his activity is subject to public view.

For all these reasons, I believe this section will be an important contribution toward vastly improving the atmosphere in which the Antitrust Division must operate in seeking to enforce the law. I have little doubt that enactment of this section might enable the Government's attorneys to do an even better job of litigating a particular case.

F. PRIMA FACIE EFFECT

A final provision in the consent decree procedures retains the provision presently contained in section 5 of the Clayton Act which prevents use of a consent decree in any way in subsequent litigation as prima facie evidence of violation. A new subsection (g) would be added which provides that proceedings before the district court in connection with the decree and public impact statements filed pursuant to the provisions of the bill are not admissible against any defendant in any action or proceeding brought by any other party against that defendant under the antitrust laws or by the United States under section 4A of the Clayton Act, nor may they constitute a basis for introduction of the decree as prima facie evidence against such defendant in any such action or proceeding.

The basic reason for including this provision is to preserve the consent decree as a substantial enforcement tool by declining to give it prima facie effect as a matter of law.

Although there have been suggestions that such effect be written into the law this bill does not reflect such suggestions. Since the primary purpose of the new consent decree procedures is to improve the process by which such decrees are used, continuation of the protection against prima facie effect appears necessary.

However, this provision is not intended to affect the Government's ability to require a so-called asphalt clause providing such effect where such a clause is deemed appropriate.

II. INCREASED CRIMINAL PENALTIES

A second part of the bill increases the penalties for criminal violations of the antitrust laws from \$50,000 to \$100,000 for individuals and to \$500,000 for corporations. In an era when the profits available through antitrust violations can run to the millions of dollars, this increase is long overdue.

Former Attorney General John Mitchell, himself no stranger to corporate boardrooms, said this in support of increased corporate penalties in 1969:

The maximum fine for violations of the Sherman Antitrust Act was increased to \$50,000 in 1955. Since that time the assets and profits of corporations have increased dramatically, while the purchasing power of the dollar has decreased greatly. Consequently, the basic purpose of such a fine—to punish offenders and to deter potential offenders—are frustrated because the additional profits available through prolonged violation of the law can far exceed the penalty which may be imposed. The \$50,000 statutory maximum makes fines in criminal antitrust cases trivial for major corporate defendants.

The need for this increase is self-evident. The only way violations of the antitrust laws will be deterred is by making the cost of violations unacceptable. In-

creasing the fines is not the only solution; more jail sentences for individual defendants might well be the most effective deterrent. But increasing the monetary penalties might well remove some of the profits which make antitrust violations attractive to otherwise ethical businessmen.

Increasing the maximum fine will do nothing if judges fail to use it effectively. Actual fines in the past have been far below the maximum possible. The Ralph Nader study group report on antitrust enforcement recently estimated that between 1955 and 1965, corporate fines average \$13,420 and individual fines \$3,365. Unless judges are prepared to make a violation economically painful, mere increases in statutory maximums will carry little deterrent value.

III. APPELLATE REVIEW OF ANTITRUST CASES

Mr. President, the final portion of this bill would amend the Expediting Act to improve the procedures for appeals in antitrust cases, and particularly to permit immediate Supreme Court review of those cases of general public importance. Additionally, it would remove the present uncertainty as to whether or not the interlocutory appeal statute is available under the Expediting Act. This present uncertainty has hampered the Department of Justice in obtaining preliminary injunctions in antitrust cases because of the doubt as to the applicability of appellate review.

In brief, the proposal would amend section 1 of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) which provides for a three-judge district court in civil actions where the United States is a plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, when the Attorney General files with the district court a certificate that the case is of general public importance. The section also provides that the hearing and determination of such cases shall be expedited. The amendment would eliminate the provision that a three-judge court be impaneled when the Attorney General files his expediting certificate, but would retain the expediting procedure in single-judge courts.

The bill would amend section 2 of the act (15 U.S.C. 29, 49 U.S.C. 45), which provides that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section 1 of the Expediting Act will lie only in the Supreme Court. The amendment would eliminate directed appeal to the Supreme Court in such actions for all but cases of general public importance, substituting normal appellate review through the courts of appeals with discretionary review by the Supreme Court. The amendment provides that any appeal from a final judgment in a government civil case under the antitrust laws, or other statutes of like purpose, and not certificated by the Attorney General or the district court as requiring immediate Supreme Court review will be taken to the court of appeals pursuant to section 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to section 1292(a)(1) and 2107 of title 28 of the United States Code, but not otherwise. Any judgment entered by the courts of appeals in such actions shall be subject to review by the Supreme Court upon a writ of certiorari.

The amendment also provides that an appeal and any cross-appeal from a final judgment in such proceedings will be directly in the Supreme Court if, not later than 15 days after the filing of appeal, (1) upon application of a party, the district judge who decided the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice or (2) the Attorney General files in the district court a certificate containing the same statement. Upon filing of such an order or certificate, the Supreme Court shall either dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law or deny the direct appeal and remand the case to the court of appeals. Review in that court could then go forward without further delay. This is similar to the procedure of the Criminal Appeals Act (18 U.S.C. 3731).

These revisions represent a substantial improvement in the appellate process for antitrust cases. In addition, the provisions authorizing appeal by the Government from a denial of a preliminary injunction at the district court level are directly responsive to the repeated pleas of the former head of the Antitrust Division, Richard McLaren, voiced recently. Judge McLaren repeatedly emphasized the need for legislation to give the Government the right to appeal from such denials:

Again, I refer to the fact that we have asked, or the Department asked repeatedly for legislation that would give us the right to appeal in those denials.

That request has been echoed recently by Donald Baker, Chief of Policy Planning and Education for the Antitrust Division:

Under present law, the Government has no effective appeal from a denial of a preliminary injunction in a merger case. We have sought unsuccessfully to get that power in recent years. Congress has not acted.

This bill will resolve that problem in a manner acceptable to the Justice Department. All of the revisions of the Expediting Act contained in this bill have been endorsed by the Department in hearings during the 91st Congress.

Mr. GURNEY. Mr. President, I am pleased to join with the distinguished Senator from California (Mr. TUNNEY) in reintroducing legislation which would amend the antitrust laws so as to make more information available to the courts, and to the public, about proposed consent decree settlements of antitrust cases. The consent decree is an important and useful tool in the enforcement of our antitrust laws, and this legislation to enhance its effectiveness will serve to strengthen our national commitment to the ideals of freedom and the free enterprise system.

Consistently with the ideals of freedom and the free enterprise system, competition by entrepreneurs in the marketplace is generally considered indispensable to the production of high-quality goods at the lowest possible price. Producers and consumers alike benefit when no one company or corporation controls an industry to the extent that competitive producers can be driven out of the market or that prices can be set arbitrarily at high levels.

Just as Government is charged with the duty to protect the rights of individuals in a political and social sense, so, too, does it have an obligation to protect their rights in an economic sense. To meet this obligation, legislation has been passed, starting with the Interstate Commerce Act in 1887, to protect businessmen and consumers alike from monopolistic practices that act in restraint of free and open trade. The Sherman Act, the Clayton Act, and the creation of the Federal Trade Commission are but a few examples of our efforts to insure that the free enterprise system remains free and competitive.

The trend toward "consumerism" in recent years emphasizes that effective antitrust legislation is as important today as it ever was, and while the laws on the books have served us well, changing times always leave room for improvements to be made. It is the purpose of this bill to improve the procedures for enforcement of our antitrust laws by providing the public with greater information with which to assess antitrust effectiveness.

For example, in recent years we have seen a dramatic increase in the number of conglomerates or holding companies—huge corporations that have interests in a wide range of industries. There is nothing necessarily wrong with size, per se, and in many cases the industries involved may benefit. Yet unless a watchful eye is kept on such developments there is a danger that the interests of the public may be done a disservice. Although there is no inherent danger to size, the very vastness of some companies presumably has some effect on the Nation's economy.

The key here is information, information on what is being contemplated, how it came to pass, what the public impact may be, and how individuals affected might obtain recourse in case of injury. With present-day business dealing more complex than ever, the public has a need for a greater amount of information than ever, if its interests are best to be served. And that is exactly what this bill proposes to do—make more information available to all concerned.

Specifically, this bill establishes a specific but reasonable set of standards and guidelines to govern the settlement of antitrust cases and, in particular, the procedures by which consent judgments are entered into. This bill basically expands upon existing law and does not work undue hardship upon anyone. In my view, its passage would have the positive effect of enhancing public confidence in the way antitrust cases are being handled.

Basically, the bill can be divided into three sections. The first section would require that any consent decree proposed by the Justice Department must be filed with the court and published in the Federal Register 60 days before it is intended to take effect. At the same time the Department would be required to

file a "public impact" statement listing information on the case the settlement proposed, the remedies available to potential private plaintiffs damaged by the alleged violation, a description of alternatives to the settlement, and the anticipated effects of such alternatives.

As it stands now, these consent decrees must be filed with the court 30 days in advance and similar public impact statements are already required in other areas by the National Environmental Protection Act. The extra time and additional information that this bill requires is for the purpose of encouraging and, in some cases, soliciting additional information and public comment that will help the court decide if the consent decree should be granted. To insure that public comment receives consideration, a further provision requires that the Justice Department file a formal response to it.

As to whether or not the consent decree should be accepted by the Court, this bill requires that the decree be accepted only after the Court has determined that it is in the public interest. This is a particularly important provision since, after entry of a consent decree, it is often difficult for private parties to recover damages for antitrust injuries. In some cases, the Court may find that it is more in the public interest, for this reason and others, for the case to go to trial instead of being settled by agreement.

Because the consent decree is an important and useful method of antitrust enforcement, it is not the purpose of this bill to undo its effectiveness. Instead, the bill provides that proceedings before the district court in connection either with the decree itself or the required public impact statements are not admissible against any defendant in any antitrust action nor may they be used as a basis for introduction of the decree itself as evidence. By declining to give it *prima facie* effect as a matter of law, the consent decree is thereby preserved as an effective tool of law enforcement.

The other portions of the bill are also very important and valuable. They raise the penalties for criminal violations of the antitrust laws and improve the appeals procedures in antitrust cases. The present maximum fine of \$50,000 is an inadequate deterrent against violations, and providing for immediate Supreme Court review of those cases of general public importance can only benefit everyone concerned.

The use of consent decrees by the Department of Justice is highly important to the effective administration of our antitrust laws. A great number of judgments each year result from this practice. During the years 1955 to 1967, 81 percent of all antitrust judgments were represented by consent decrees. The following figures show the percentage of antitrust judgments represented by consent decrees during the period 1955 to 1972:

	<i>Percent</i>
1955 -----	91
1956 -----	91
1957 -----	88
1958 -----	88
1959 -----	82
1960 -----	100
1961 -----	70
1962 -----	100
1963 -----	82
1964 -----	88
1965 -----	75
1966 -----	80
1967 -----	53
1968 -----	66
1969 -----	57
1970 -----	84
1971 -----	93
1972 -----	76

If we are to be effective in our efforts to promote free enterprise and to discourage monopolistic business activity, we must be firm, we must be fair, and we must insure that the public interest—the rights of individuals to buy and sell goods at the marketplace without undue interference—shall to the greatest extent possible be protected.

U.S. SENATE,
Washington, D.C., March 28, 1972.

GORDON F. HAMPTON,
Los Angeles, Calif.

DEAR MR. HAMPTON: I am writing to solicit your opinion on a matter of deep concern to me. During the past few weeks, as a member of the Judiciary Committee, I have been a participant in the committee's investigation of the ITT anti-trust settlement. Although the committee's study has not yet been concluded, one of the major and, I think, continuing issues which has arisen during the hearings is the process by which the Federal Government goes about settling major anti-trust cases.

The basic problems, as I see them, are first, to assure that there is adequate opportunity to evaluate the merits for and against such a settlement; and second, to avoid even the appearance of private or special influence in the decision to settle.

These problems are fundamentally apolitical; they exist in any administration regardless of party. In the long run, no one in politics benefits from a controversy such as the present one because it goes to the heart of the people's faith in their Government. For this reason, I believe it is important that both Congress and the Justice Department give particular attention to construction ideas for reform. Therefore it is my hope that regardless of outcome of the committee hearings, it will be possible to construct and implement some meaningful reforms.

Two weeks ago I outlined two such reforms in a letter to Mr. Kleindienst. I am enclosing a copy of that letter and I would appreciate very much your own evaluation of those proposals.

A third proposal on which I would welcome comment concerns the opportunity for public participation in the process by which consent decrees are approved in court. It has been suggested to me that some form of intervention in such proceedings should be permitted for representatives of the public, e.g. the so-called public interest law firms or other groups.

I apologize for the length of this request, but any assistance you can provide will be most helpful. It may also contribute to strengthening the processes of government in ways that will protect both the public and the public official.

Best personal regards,

JOHN V. TUNNEY,
U.S. Senator.

U.S. SENATE,
Washington, D.C., October 20, 1972.

GORDON F. HAMPTON,
Los Angeles, Calif.

DEAR MR. HAMPTON: Last March I wrote to you and other members of the antitrust bar soliciting their views on a variety of proposals for changes in the antitrust laws. During the six months since that time I have had an opportunity to study the responses and to consult with a number of persons in Government and private practice about the merits of those proposals.

Drawing upon that study, I have now drafted a bill, S. 4014, which I introduced on September 15th co-sponsored by Senator Edward J. Gurney (R., Fla.), a fellow member of the Senate Antitrust and Monopoly Subcommittee. The legislation has four principal thrusts: first, reform of the procedures governing the settlement of antitrust cases; second, regulation of lobbying activities in connection with such settlements; third, increases in the criminal penalties for violation of the antitrust laws; and fourth, revision of the Expediting Act to improve the appellate process in antitrust cases.

We have introduced the bill at this time in order to provide adequate time for review by members of the bar prior to hearings by the subcommittee early next year. I am enclosing a copy of my remarks explaining the bill and I would be most interested in any comments you may have regarding its provisions.

Best regards,

JOHN V. TUNNEY,
U.S. Senator.

MARCH 6, 1972.

HON. RICHARD G. KLEINDIENST,
*Acting Attorney General,
 Department of Justice,
 Washington, D.C.*

DEAR MR. KLEINDIENST: In preparing my questions for the continuation of your testimony, I am particularly concerned that we look for mechanisms to avoid in the future the type of situation with which we seem to be confronted at the moment. That situation as I see it, presents to the general public a picture of governmental decision making which gives the appearance, whether legitimate or not, of compromises arrived at and bargains struck through special and perhaps improper influence. Such appearances do nothing to confirm the public's faith in our governmental system. By thinking now about new safeguards we may also provide the means for public officials to act in a manner above criticism.

For this reason I want to raise with you two possible areas of reform which I began discussing with you on Friday. I want you to have the opportunity to consider them before they are raised tomorrow so that we might have the benefit of more than a few moments of deliberation.

Pursuant to your general authority under 28 U.S.C. Part II, § 31, would you as Attorney General consider implementing the following, by means of administrative order, in order to mitigate some of the problems we have seen in this case?

(1) *A rule that whenever an antitrust case is settled, a reasoned opinion be made public articulating why the settlement is adequate, in the public interest, and achieves the original purpose of the complaint.* This statement would go beyond the rather limited press release which is now issued when consent decrees are filed and would provide a basis for public evaluation of a proposed consent decree once it is filed for comment.

Such a procedure would hardly be revolutionary. Thurmond Arnold, shortly after taking over as head of the Antitrust Division in 1938, announced that he would regularly issue public statements explaining Antitrust Division action which would include: (1) the conditions which the Department believes to exist in the particular industry which create monopolistic control or restraint of trade; (2) the reason why the particular procedure was followed, whether a civil suit, consent decree, criminal prosecution, acceptance of pleas of *nolo contendere*, or dismissal of the proceeding; and (3) the economic results which are to be expected from its action in the particular case.

In 1968 Professor Donald Turner, then head of the Antitrust Division, implemented his Merger Guidelines, specifying which mergers would probably be blocked by Justice and which would not. Judge McLaren has substantially followed them. Their purpose, too, has been to announce publicly antitrust policy so that the public and potential defendants are appraised of what to expect.

I consider it especially vital that such public explanations accompany consent decrees like ITT. A consent decree cuts off later treble damage claimants from citing the settlement as *prima facie* evidence of liability. And more seriously, a bad consent decree can be worse than the preexisting situation since it could immunize the situation from later antitrust attack; e.g., the ATT-Western Electric settlement. A public elaboration could discourage bad decrees—because they would be harder to defend and would invite public criticism—and it could spare enforcers embarrassing political pressures by objectifying reasons which could be utilized in future proceedings.

(2) A requirement that any *ex parte* meeting or phone conversation between defendants in pending antitrust cases and the (a) Assistant Attorney General Antitrust Division or his deputy, (b) Deputy Attorney General, (c) Attorney General, and (d) White House staff be reported in written form by the particular official and listed with the court in which the suit is pending, including a description of general purpose of the visit. You earlier testified that the public should trust their elected or appointed officials in such situations; perhaps they should, but in point of fact they often do not. Like Caesar's wife, government officials should endeavor to place themselves above suspicion.

This kind of proposal was put forward in another form by Professor Philip Elman while he was an FTC Commissioner. He suggested that the FTC ban

ex parte communications by interested parties to individual commissioners during all agency proceedings where a quasi-judicial function was performed.

Last Friday, I asked you whether Congress should enact a law requiring the listing of *ex parte* contacts. In your answer, you noted that such a reporting requirement would be too burdensome given the number of calls and visitors you receive each day. The rule I propose would be only for antitrust cases, of which only an average of 56 a year have been filed in the past decade. Most defendants settle quickly, without ever permitting the Deputy Attorney General or his superiors. Moreover, antitrust cases usually involve large economic stakes and they usually involve business defendants most able and prone to attempt massive lobbying or influence. As I recall it, upon becoming Deputy Attorney General, you instituted a procedure whereby Justice Department employees had to keep time sheets of all daily activities. It seems to me that my suggestion would be far less burdensome than your own internal reform.

Both of these proposals seek to instill public confidence in government by opening up its processes and its doors. I would hope you will help us all to learn from this experience.

Sincerely yours,

JOHN V. TUNNEY,
U.S. Senator.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., April 7, 1972.

Hon. JOHN V. TUNNEY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR TUNNEY: This will respond to your letter of March 6, 1972. You describe two areas in which reform might be called for in the Antitrust Division's consent decree program.

First, you asked whether I would consider issuing an administrative order establishing a rule that, whenever an antitrust case is settled, a reasoned opinion be made public articulating why the settlement is adequate, is in the public interest, and achieves the original purpose of the complaint. You suggested that this statement should go beyond "the rather limited press release which is now issued when consent decrees are filed," in order to provide a basis for public evaluation of a proposed consent decree which has been filed for comment.

From time to time the Antitrust Division has considered the best procedures for accomplishing the objectives you describe. We continue to do so. I should first observe, however, that whether or not changes in our procedure are finally settled upon, no formal administrative order is necessary.

Antitrust Division settlements in important cases are announced as soon as they are firm (even though the agreement may be only an agreement in principle) in order to prevent insiders from taking advantage of their preferred position in the securities market. In all antitrust cases, a press release is also issued at the time the proposed settlement has been filed with the court. The object of these press releases is to secure the widest possible notice of our proposed decrees so that interested or affected parties are put on notice that their interests may be affected. Thereafter, such persons can make a more careful study of the matter by reading the documents on file with the court, including the complaint and the full terms of the settlement. I think it would be unwise to try to mold our press releases or other procedures into an inflexible pattern, for this would limit their utility with respect to our general operating program.

Under our procedures all settlements are required to be filed with the court for a period of 30 days before they are submitted to the court for final approval. The Government may withdraw its consent to the settlement at any time during the thirty-day period. Interested parties can compare the complaint and the proposed settlement relief to see whether the proposal secures for the Government all of the relief it reasonably could be expected to obtain at the conclusion of a successfully litigated trial, and such parties are free to comment to the Department and to the court. On occasion the Government modifies the proposed relief in the light of these comments. If interested parties want to be heard on the settlement, the Department urges the court to receive their views at a public hearing before entering the order which makes the settlement final. A rec-

ord is made of all matters before the court in such settlements, which is available to the press, to attorneys and to the public in general.

Since press releases serve merely to provide notice to such parties, the Department has refrained from incorporating arguments, explanations, comments or other claims in the press releases. The tendency to make claims of "victory" at the time when a controversy is being ended might tend to put a restraint upon the desire of defendants to seek an out-of-court settlement. Since the consent decree program is an important and useful part of the Antitrust Division's enforcement activities, it would be unfortunate if such considerations were to result in a substantial curtailment in this method of effectively terminating litigation.

In sum, our goal is to provide press releases which reveal the basic facts from which the public may discern the general nature and significance of the settlement. We shall continue to work toward this goal. In this spirit, I propose to add to our press releases a specific reference to the fact that comments to the Department and the court are invited from members of the public during the 30-day waiting period.

Finally, in every case the Antitrust Division has stood ready to explain the settlement in full detail in open court. In many cases such a presentation has been made on the Department's own initiative, and I intend to continue this policy. The following is a description of the procedures followed in some of the more important recent cases, together with copies of the press releases issued so that you may observe in more concrete form what the Division's practice has been:

(1) UNITED STATES V. AUTOMOBILE MANUFACTURERS ASSOCIATION, ET AL.
(CENTRAL DISTRICT, CALIF.)

When the proposed decree in this action was filed on September 11, 1969, the press release (enclosed as Exhibit A) was issued and the Court (Judge Curtis) was advised by the attorneys for the Government and the defendants concerning the nature of the case, the relief sought and the provisions of the decree which were being filed, and the same day, Assistant Attorney General McLaren held press conferences both in Los Angeles and Washington at which he discussed the decree. A month after the decree was filed, the parties consented to a minor revision to conform with several suggestions for modification. Finally, after inviting the views of all interested parties and public bodies, Judge Curtis held a day-long hearing in open court on October 28, 1969, following which he announced his decision to enter the decree. We attribute this public response in large part to the publicity given to the proposed decree when it was lodged with the Court the previous month.

(2) UNITED STATES V. LING-TEMCO-VOUGHT, INC., (JONES & LAUGHLIN ACQUISITION),
(W.D. PA.)

On March 6, 1970, upon reaching agreement in principle with the defendants as to the terms of a proposed consent judgment, the Government issued a press release to prevent any "insider trading" (Exhibit B). On March 10, 1970, the proposed judgment was lodged with the Court. Thereafter, the Court ordered a hearing on the proposed judgment, and the Government filed an extensive statement of facts demonstrating why the judgment was in the public interest and why it would achieve the essential purposes of the complaint, and moved for the entry of the judgment. On June 1, 1970, all interested parties were heard in open court, and thereafter the judgment was supplemented by agreement of the parties with provisions relating to employee pension and benefit funds. On June 10, 1970, when Judge Rosenberg entered the Final Judgment and promulgated an opinion explaining his reasons for approving it, another press release was issued (Exhibit C).

A year later, on April 9, 1971, when the Government objected to a proposed plan by LTV to divest Okonite to Amega-Alpha, Inc., it publicized its objection by press release (Exhibit D). Thereafter, when the divestiture plan had been revised to meet the Government's objections, a second press release was issued which announced the Government's withdrawal of its objection and its reasons therefor, and invited interested persons to examine both the report to be filed with the Court, and the documents submitted to the Department which contained the parties' representations and undertakings (Exhibit E).

(3) UNITED STATES V. INTERNATIONAL TELEPHONE CORPORATION (GRINNELL, CANTEEN AND HARTFORD FIRE INSURANCE CASES), (DISTRICT OF CONNECTICUT AND NORTHERN DISTRICT OF ILLINOIS)

Announcement that agreement in principle had been reached was communicated to the public with respect to the consent decrees in the ITT cases by a press release dated July 31, 1971 (Exhibit F). That press release spelled out the basic terms that were embodied in the final decree presented to the Courts in Hartford (Judge Blumenfeld) and in Chicago (Judge Austin) on August 10, 1971, when counsel for the parties in each case described and explained the terms of the decrees. A second press release was issued by the Department on August 23, 1971, at the time that the official filing of the decrees was accomplished (Exhibit G). Finally, on September 23, 1971, a public hearing on these decrees was held in Hartford at which counsel for the Government and for ITT in open court described the terms of the decrees in some detail and answered the questions posed by Judge Blumenfeld. The transcript of that hearing has been made part of the record in the current Senate Judiciary Committee hearings.

(4) UNITED STATES V. SWIFT & COMPANY, ET AL. (NORTHERN DISTRICT OF ILLINOIS)

On November 17, 1971, the parties submitted a proposed Modified and Supplemental Final Judgment, amending a 50-year-old consent decree. The purpose of the amendments were, *inter alia*, to permit the meat packers to enter certain new activities in ways which the Department believed would be pro-competitive. When the judgment was lodged with the court, the attorneys for the Government explained its terms and purposes to the district judge. They also showed the judge a press release (Exhibit H) which was being issued to notify any interested party that, in the absence of objection, the modified judgment would be entered after 30 days. On December 20, 1971, a joint motion urging the court to enter the revised judgment was made in open court and the Government's Memorandum in Support was filed. (Exhibit I) There being no objection, the court entered the Modified and Supplemental Judgment.

Next you suggest that Congress pass a law requiring "*ex parte*" meetings or phone conversations between antitrust defendants and the (a) Assistant Attorney General, Antitrust Division, or his Deputy, (b) Deputy Attorney General (c) Attorney General and (d) White House staff, he reported, described and listed with the appropriate decree court. In that connection, you cited a proposal by then FTC Commissioner Philip Elman, that the FTC ban *ex parte* communications between interested parties and individual commissioners during all agency proceedings where a quasi-judicial function was performed.

As I stated at the hearing session of March 7, I find this suggestion—as the previous one—to be very thoughtful and I have given it serious consideration. However, a thorough analysis of your suggestion has raised questions in my mind as to its inherent premise and also as to the conclusions to which it leads.

The more I thought about your suggestion, the more clear it became that your proposal seems to assume that antitrust officials, and other government officers when dealing with antitrust matters, are so suspect that their every coming and going should be recorded by them and made public. Unfortunately, if this is so the records kept by such people would be similarly suspect.

I cannot in good conscience subscribe to this premise. In general, I think that those who over the years have served the Federal Government have done so honestly and forthrightly and have discharged their responsibilities in the public interest.

To be sure, from time to time there are disclosures of improper dealings and fraud in Government; I believe that such conduct should be rooted out and prosecuted. But I think you will agree that those not worthy of trust would not be trustworthy in keeping the records you suggest, and those who do not trust such officials would assume the records were not honest in any event.

I think you will also agree with me that, with respect to honesty, integrity and public service, the record of those responsible for antitrust enforcement, under administrations of either party, has been exemplary. Judge McLaren and his recent predecessors, and those who served under them, represent the highest level of skilled and dedicated professionalism. Thus, considering the premise which necessarily underlies your proposal, to single out antitrust enforcement for special treatment of the type which you suggest seems ironic, unwise and demeaning.

Moreover, if there be merit to your proposal, it seems to me that it should be applied to all public officials at every level and of all branches of Government and all should be required to make periodic public disclosure of who they meet or talk with, when, and about what. If, as you stated at the hearings, your purpose is to provide protection for public officials, I think that careful study should be given to extending such protection to all public officials—for, as you indicated, all can be subject to false accusations.

For these reasons, I think that both suggestions deserve careful thought. But, also for these reasons, neither proposal should be enacted hastily, without that careful thought, and amid a controversy fueled by titillating but unfounded allegations.

Sincerely,

RICHARD G. KLEINDIENST,
Acting Attorney General.

REMARKS OF DONALD F. TURNER¹ AT NATIONAL INSTITUTE OF THE ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION, ATLANTA, GA., NOVEMBER 10, 1972

(This speech was transcribed from a tape recording but has not been edited by Professor Turner)

When I was invited down here, and I was thinking about what to say, I decided that I would proceed on the premise that my administration did not need any defense, and that I would not initiate one, although I would be prepared to respond if questions were raised.

I want to talk about consent decree procedures. I thought for a moment when Lee Loevinger began speaking that he was going to take my speech away. I don't have to throw any of it away. He didn't take any of it.

I hope, however, that in the end, I will not get the response that the law professor got when he wrote a book. The opening sentence of the review of his book was, "This book fills a necessary void."

As you all know, the controversy over the ITT settlement has generated serious criticism of the Government's consent decree procedures and proposals ranging all the way from very modest change to total abolition.

We now have extensive legislative proposals being taken seriously. A bill has been filed by Senator Tunney, with Senator Gurney along with him, providing for very extensive changes.

The principal provisions of the bill in case you haven't seen it are as follows:

- (1) A proposed consent decree must be filed 60 days before its effective date.
- (2) The Government must simultaneously file a "public impact statement" containing among other things a description of the anticipated effects of the decree on competition, a description of alternatives to the proposed decree, and the anticipated effects of such alternatives.

- (3) The Government must entertain written comments from interested persons and prepare and file in court and in the *Federal Register* responses to those written comments.

- (4) The court is authorized to permit full or limited participation or intervention by "interested persons" or agencies.

- (5) Before approving the decree, the court must determine that it is "in the public interest," taking into account alternatives, the impact of the decree on the public generally and on individuals alleging specific injury from the alleged violations, and the public benefit to be derived from determining the issues at trial.

Now, not all of those procedures raise serious questions. I would expect no earth-shaking consequences from extending the waiting period on the consent decree from the present 30 days to 60 days, although I think in either event there ought to be provisions for shortening it under appropriate circumstances.

Nor do I think that vehement objection can be made to a proposal that the Government explain what the competitive effects of the proposed decree are expected to be, although they will often be self-evident.

But the bill as a whole would clearly impose significantly greater burdens and costs on the Government and the courts in the processing of consent decrees.

¹ Donald F. Turner was the Assistant Attorney General in charge of the Antitrust Division, U. S. Department of Justice, from 1965-68. Since 1968 he has been a professor of law at Harvard. Prof. Turner is the author of many works in the field of antitrust and is the co-author of *Antitrust Policy*.

I think we can confidently expect that there will be attempted intervention, a rash of comments, and at least some prolongation of proceedings in all but the most routine cases, and probably in the latter as well.

Now, the imposition of these additional costs and burdens, it seems to me, is defensible only if there is a clear need or purpose to be served that outweighs them.

It must appear that not only present procedures lead to a significant number of inappropriate decrees, but also that the proposed new procedures would materially improve the results of consent decrees taken as a whole, and materially improve the effectiveness of antitrust enforcement generally.

None of these propositions has been satisfactorily established, and I do not believe that they can be. The vast majority of the consent decrees I have seen over the past years appear substantively, unobjectionable, particularly the ones in which I have participated.

Full or reasonably full relief from the violations complained of is normally obtained. To be sure, there have been some decrees which, when matched with the complaint to which they were addressed, seem substantively inadequate or peculiar.

But at least some peculiar decrees probably involved peculiar circumstances which it was perfectly legitimate to take into account, such as changed circumstances affecting the firm or industry concerned, and cases in which the agency was convinced that the violation had occurred but had been unable to marshal a convincing set of facts.

But taking as given that from time to time the Government agrees to an inappropriate decree, would the proposed procedures make a significant contribution to resolving the difficulty?

This is far from clear to me. The prospects for obtaining more extensive relief through third party intervention and closer court scrutiny are severely limited by the obvious fact that no court can impose more significant relief on the defendants than they are willing to accept.

And in the event of refusal by defendants to accede, the only choices left are either to retreat to the decree that they will agree to, to dismiss the case, which I think the Government may well often do, or to proceed to full litigation.

Moreover, in some cases, more extensive relief may be of dubious or no merit. This appears to me to be a serious danger that modifications in response to the claims of, or designed to serve the interests of, private intervenors may worsen a decree rather than improve it; they restrict competition rather than promote it.

Now, one would, of course, hope that the courts would resist bad proposals, but the history of decision-making by administrative agencies, operating under these kinds of loose standards that this proposed statute would impose, showing quite an evident tendency to reach compromise by giving something to everyone, is not reassuring.

In sum, looking strictly at the probable effects of the proposed legislation and the appropriateness of particular decrees, there is little reason to believe that on balance the effect would be favorable.

And when you ask the broader question of what effect these proposals would have on the effectiveness of antitrust enforcement generally, it seems to me the answer is almost certainly negative.

As I have noted, and as is obvious, the proposals would substantially increase the resources that the Government would have to devote to processing of consent decrees, and would thus prevent those resources from being used for antitrust enforcement elsewhere.

The proposed bill might even be interpreted to preclude any consideration of such opportunity costs. There is no mention of it in the legislation. But even if it were amended to provide for this, how is a court to decide the issue?

For if the Government has concluded that the added amount of relief which could be obtained through litigation is not worth the price, and where the defendant is unwilling to accept the added provisions, on what basis can a court secondguess the Government?

More fundamentally, should it really be asked to do so? I have a few additional comments before concluding. There are two critical points, I think, that are either overlooked or not adequately appreciated by those pumping for greater private participation in consent decree procedures.

The first is that anyone who thinks anyone is violating the antitrust laws, or has [violated them], and that he is injured by it, can test out his belief in a private suit.

That the Government has consented to a decree falling short of what he thinks is appropriate may have an adverse psychological effect in his case, but imposes no legal bar.

The second point, which Lee Loevinger averred to, is that one cannot divorce the issue of consent decree procedures from the general issue of prosecutorial discretion, and the proper location of antitrust policy-making in general.

If one is really serious about injecting additional third party and judicial input into Government antitrust policy-making, he must consider that as things stand the Government can decline to bring a case at all, can settle a potential case informally on the basis of written undertakings, and can decline to prosecute further a case it decides is no longer worth pursuing.

It is in these areas, particularly the first, that much more important policy determinations are made than in the formulation of this or that consent decree.

And if we focus on the broader issue, I am convinced myself that whatever the prospects may be for the development of a more coherent and rational antitrust policy, they do not lie in diluting the role of the Department of Justice; they do not lie in making each Government antitrust case a vehicle for participatory democracy. Thank you.

REPORT FROM THE HOUSE OF DELEGATES ON PROPOSALS TO MAKE TREBLE DAMAGE PAYMENTS NON-DEDUCTIBLE AND TO AMEND THE EXPEDITING ACT

(By Richard W. McLaren, Section Delegate to the House of Delegates)

Our Section presented to the Midyear Meeting of the House of Delegates in February two proposed resolutions. One opposed legislation designed to make treble damage payments and expenses non-deductible for Federal income tax purposes. The other urged amendment of the Expediting Act¹ to provide that appeals in Government civil cases will go to the courts of appeals, instead of directly to the Supreme Court (as at present), except under extraordinary circumstances.

I am glad to report that both resolutions were adopted by the House of Delegates without a single dissenting vote. The two resolutions appear in the current issue of the American Bar Association Journal² and are reprinted as an appendix to this report.

Since both of these matters are important and undoubtedly are to receive considerable attention in the next year or so, I would like to explain the resolutions in a little more detail, and solicit your active support for them with your Congressional friends.

* * * * *

AMENDMENT OF THE EXPEDITING ACT

You will recall that Section 1 of the Expediting Act³ provides for a three-judge court to try a Government civil antitrust case upon the filing of a certificate of general public importance by the Attorney General. Section 2⁴ provides that appeals from the trial courts in Government civil antitrust cases shall be direct to the Supreme Court automatically, *i.e.*, without the filing of any certificate, and it has been held that the Courts of Appeals are entirely without jurisdiction of such cases.⁵

A great deal has been written and said in the last five or six years on the subject of amendment or repeal of the Expediting Act and I am not going into the detail of the arguments. The case for eliminating the direct appeal was well stated—and I believe first stated—by Gerhard A. Gesell in an address to the New York State Bar in 1961.⁶ In essence, it was his position that things have so greatly

¹ Act of February 11, 1903, C. 544, 32 Stat. §23, as amended, 15 U.S.C. §§ 28, 29.

² 52 A.B.A.J. 391, 397-98 (1966). See pp. 129-30 *infra*.

³ 15 U.S.C. § 28.

⁴ 15 U.S.C. § 29.

⁵ See *United States v. California Cooperative Canneries*, 279 U.S. 553, 558-59 (1929); *United States Alkali Export Ass'n., Inc. v. United States*, 325 U.S. 196, 201-02 (1945); *United States v. FMC Corp.*, 321 F. 2d 543 (9th Cir. 1963), application for injunction denied by Mr. Justice Goldberg, 84 Sup. Ct. 4 (1963).

⁶ Gesell, *A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases*, 1961 Antitrust L. Sym. 98.

changed since the Expediting Act was adopted that is is now both unnecessary and inappropriate. He pointed out that the courts of appeals are now well established (which they were not in 1903, being only 12 years old) and entirely competent to handle antitrust cases; that antitrust cases today present not novel legal questions, but complex factual issues which it is physically impossible for the Supreme Court to review, and they should accordingly be handled like other comparable types of litigation, leaving to the Supreme Court "problems not of fact, but of deciding new frontiers of antitrust law."¹⁰ Mr. Gesell suggested that "were the Expediting Act eliminated, we would greatly alleviate the burden on the Supreme Court, we would get a careful intermediate appellate review, and we would get the benefits of the Interlocutory Appeals Statute . . . all desirable objectives."¹¹

Richard A. Solomon, then head of the Appellate Section of the Antitrust Division, speaking at the same meeting, agreed "that Supreme Court review of factual findings by the district court . . . is an extremely limited one" and that "[s]ince many antitrust cases rise or fall upon interpretations of disputed factual matters this means that all too frequently there is no effective appeal from an adverse ruling of a single district judge."¹² Solomon nonetheless felt that the Expediting Act had been effective to speed up the disposition of antitrust cases and that it should not be repealed, but possibly amended, so that "major economic cases where expedition is still vital" could be certified directly to the Supreme Court.¹³

The following year, in the *Brown Shoe* case, Mr. Justice Harlan (with Mr. Justice Clark concurring), suggested that, in view of its mounting docket, the Supreme Court be relieved of "the often arduous task" of reviewing long trial records to determine if factual findings are supportable, pointing out that in most antitrust cases the legal issues "are no longer so novel or unsettled" as to make direct review appropriate, and suggesting that both "expedition" and "ever-all, more satisfactory appellate review" would be achieved by returning primary appellate satisfactory to the courts of appeals.¹⁴

In 1963, in the *Singer Manufacturing* case, seven of the eight other justices then sitting joined in an opinion by Mr. Justice Clark which reiterated the views expressed in *Brown Shoe*: "Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the court of appeals."¹⁵ Mr. Gesell's talk to the New York bar was specifically cited.¹⁶ Repeatedly, since *Singer*, individual Justices have called for action to ease the Supreme Court's workload, emphasizing that detailed fact finding reviews are more properly and probably better done by the courts of appeals.¹⁷

Responding to the Supreme Court's suggestion, in April 1963 the Attorney General transmitted to Congress a draft bill to amend the direct appeal provision of the Expediting Act. This bill (which became S. 1892) would have restored the courts of appeals as the normal channel for Government civil cases unless "the Attorney General, or the district court either on application of a party or on its own motion, has certified that the case is of general public importance." This in effect carried out the suggestion made in 1961 by Mr. Solomon.

Being of the view that the normal certiorari procedure would permit the Supreme Court to exercise its discretion in deciding what antitrust cases to review—and would also suffice to deal with any peculiarly urgent cases—and that such a procedure would provide greater equality as between the Government and private defendants, the American Bar Association, at the recommendation of this Section, in May, 1963, adopted a proposed bill to repeal Section 2 of the Expediting Act. The bill would have restored the Courts of Appeals as the appellate channel, but it was emphasized that the expedited certiorari procedure provided under 28 U.S.C.A. § 1254 (1) would be available. With certain revisions, this bill was introduced by Senators Olin D. Johnston and Roman L. Hruska and became S. 1811 in the 88th Congress.¹⁸

¹⁰ *Id.* at 101.

¹¹ *Id.* at 100-01.

¹² Solomon, *Repeal of the Expediting Act—A Negative View*, 1961 Antitrust L. Sym. 94. 95. Solomon emphasized that the Government as well as defendants had suffered in the Supreme Court as a result of the Act.

¹³ *Ibid.*

¹⁴ *Brown Shoe Co. v. United States*, 370 U.S. 294, 355, 363-64 (1962).

¹⁵ *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 175, n. 1 (1963).

¹⁶ *Ibid.*

¹⁷ See, e.g., Mr. Justice Fortas' address to this Section's dinner meeting, Apr. 14, 1966, p. 131 *infra*.

¹⁸ Statements of the two senators upon introducing this bill appear in the Congressional Record for June 27, 1963 at pp. 11260-63.

In the fall of 1963, the Judicial Conference specifically disapproved the proposed American Bar Association bill, and approved the Justice Department bill only upon the condition that the Attorney General's right to file a certificate be made subject to obtaining leave of the district court.¹⁹ Opposition was expressed also by Congressman Emanuel Celler in an article in the *DePaul Law Review*, in which he criticized both the American Bar Association and the Justice Department proposals and concluded that the Expediting Act had served well and required no amendment.²⁰

It was against this background that representatives of this Section and of the Justice Department began discussions in the summer of 1965 in an effort to reach a compromise proposal which would be satisfactory to all concerned. A compromise bill was agreed upon after some months, and it was this bill which was approved by this Section last winter and incorporated in the resolution which was presented to and adopted by the House of Delegates last February. I might say parenthetically that our proposal was considered ahead of time and was supported in the House of Delegates by the Council of the Section of Judicial Administration, of which Mr. Justice Brennan and Judge Stanley Barnes, former head of the Antitrust Division, are members.

Under our proposed bill, Section 1 of the Expediting Act, providing for the impounding of a three-judge court, with direct appeal to the Supreme Court from its judgment, would be left undisturbed.

The appeal provision of the Expediting Act (Section 2) would be amended to provide that appeals from district court judgments and interlocutory orders²¹ would lie to the Courts of Appeals unless certified to the Supreme Court (1) by the district court "in the interest of justice" or (2) by the Attorney General on the ground that immediate review of the case, or a particular question of law therein, is of "general public importance."²²

If anything, this bill will speed up the determination of unsettled questions of law and strengthen—not weaken—antitrust enforcement.

The proposal specifically takes into account the fact that the Supreme Court, under its Rule 29, makes a "preliminary examination" of all certified cases "to determine whether the case shall be set for argument or whether the certificate will be dismissed," and that if the Supreme Court does not take the case for a plenary appeal (i.e., if it dismisses the certificate or issues instructions for the guidance of the lower court), an appeal on the merits still would lie from the district court's judgment to the court of appeals. Consequently, even in the case of certification, the Supreme Court would not face the Hobson's choice it has today—of either undertaking to review long records from the factual standpoint, or denying the losing party below any appeal at all.

There is little argument that the Supreme Court should be relieved of the chore of making factual reviews of antitrust records. Its workload increased from 423 cases disposed of in 1903 to 2350 disposed of in 1963—nearly six times—and I understand that the number in the current term may reach 3000. There should be an amendment not only for the humanitarian reason of lightening the Justice's burden but so that the losing litigant in the trial court will get a considered appellate review, which the Supreme Court simply does not have time for and frankly states would be better performed by the appeals courts.

This being so, the argument really boils down to this: In the extraordinary case where immediate review by the Supreme Court is desired,

(1) shall there be, as a *condition precedent*, a petition for certiorari—which under Supreme Court Rule 20 will be *granted* "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement"; or

(2) may there be a *certification* to the Court by the Attorney General that immediate review is of general public importance, with a *condition subsequent* under Supreme Court Rule 29 that after "preliminary examination" in case may be "set for argument" or the certificate "dismissed," and the cause remitted to the normal channel?

¹⁹ Report of the Proceedings of the Judicial Conference of the United States 1963, 76-77.

²⁰ Celler, *Case in Support of Application of the Expediting Act to Antitrust Suits*, 14 *DePaul L. Rev.* 29 (1964). Compare note, *The Antitrust Expediting Act—A Critical Re-appraisal*, 63 *Mich. L. Rev.* 1240 (1965).

²¹ The provisions of 28 U.S.C. § 1292(a) and (b) would apply.

²² The provision for review of a particular question of law is borrowed from 28 U.S.C. § 1254(3), giving such certification power to the Courts of Appeals, with a view to expediting decision of important legal questions, but avoiding the necessity of factual reviews by the Supreme Court.

Our compromise bill accepts the latter proposition because, first, it appears that there are and probably will continue to be *some* cases which *should* go directly to the Supreme Court, and this seems a sensible way to accomplish it; and second, because it could hardly be clearer that there will be no amendment at all if the complete repeal and certiorari route is insisted upon.

We are advised that Senator [Tydings' Subcommittee on Improvements in Judicial Machinery is very much interested in this matter and will be setting it down for hearings.²³ When the time comes I hope you will actively support our proposed bill. This is a job that needs doing. As lawyers interested in justice and good judicial administration—as well as because of our interest in antitrust—we should see that it gets done.

APPENDIX

RESOLUTION CONCERNING PROPOSED AMENDMENT OF THE EXPEDITING ACT

Whereas, Direct appeals to the United States Supreme Court in cases brought by the Government for equitable relief under the Federal antitrust laws, as provided by the Expediting Act (15 U.S.C. § 29, 49 U.S.C. § 45) are a burden upon the Supreme Court and are unnecessary and inappropriate in the great majority of cases; and

Whereas, Proposed bills to amend the Expediting Act, sponsored in 1963 by the Department of Justice and the American Bar Association, respectively, have proved unacceptable to the Judicial Conference of the United States, and have been otherwise criticized; and

Whereas, There is a continuing need for an amendment of the Expediting Act which would eliminate direct appeals to the Supreme Court in ordinary equity cases brought by the Government under the antitrust laws, while providing for direct appeals in exceptional cases;

Resolved, That the American Bar Association recommends to the Congress that legislation be enacted to amend the Expediting Act, 32 Stat. 823 (1903), 15 U.S.C. § 29, 49 U.S.C. § 45, to provide that appeals from district courts in cases brought by the United States for equitable relief under the Federal antitrust laws shall be to the Courts of Appeals, rather than directly to the United States Supreme Court, with appeals to the Supreme Court thereafter under writ of certiorari, but providing that appeals from district courts may be made directly to the Supreme Court in such cases wherein the district court certifies that immediate review by the Supreme Court is appropriate in the interest of justice, or the Attorney General certifies that immediate review of the case, or a particular question of law therein, is of general public importance;

Resolved, That the Association proposes that the foregoing be achieved by passage of a bill embodying the principles set forth in the proposed bill hereinafter set forth; and

Further resolved, That the officers and Council of the Section of Antitrust Law are authorized and directed to urge legislation in conformity with the foregoing recommendations upon appropriate committees of Congress.

INCREASING CRIMINAL PENALTIES UNDER THE SHERMAN ANTITRUST ACT

PURPOSE OF THE BILL

H.R. 14116 increases from \$50,000 to \$500,000 the maximum fine which may be imposed upon a corporation in a criminal suit for violation of the Sherman Antitrust Act (15 U.S.C. 1, 2, and 3). At the present time the maximum penalty which may be imposed upon conviction for each count of an indictment under the Sherman Act is a fine not exceeding \$50,000, imprisonment not exceeding 1 year, or both, at the discretion of the court. H.R. 14116 makes no change in the penalties applicable to natural persons. The court will continue to exercise discretion in the imposition of punishment after consideration of the gravity and duration of the offense, its consequences upon the national economy, and the need to deter future practices of comparable nature.

NEED FOR LEGISLATION

When the Sherman Act was enacted in 1890, it provided for a fine of not more than \$5,000 or imprisonment for not more than 1 year, or both. Shortly thereafter

²³ See Tydings, *The Congress and the Courts: Helping the Judiciary to Help Itself*, 52 A.B.A.J. 321, 325 (1966).

there were complaints that the fine, the penalty applicable to corporate violators, was inadequate and that effective antitrust enforcement required sanctions that would have more significance in corporate financial operations. In 1900 a committee reported to the House:

These penalties are deemed insufficient. The illegal combinations in the law mentioned are not deferred a moment by fear of a fine not exceeding the amount named * * *¹

Notwithstanding these complaints and the manifest inadequacy of the fine as a deterrent when compared to profits realizable to a corporation from illegal practices, no change was made in the penalty for 65 years. In 1955, the only time the penalty provision has been amended, the maximum fines for both individuals and corporations were increased to \$50,000.

The inadequacy that was corrected in 1955 is once again apparent. The amount of the maximum fine available to deter criminal activities is paltry when compared to the additional profits that may flow from the violation. The fine is so low that it may be regarded by some corporate executives as a good business risk.

Changes in business conditions and increases in corporate financial growth have reduced the effectiveness of the fines imposed in 1955. In the last 15 years there has been a dramatic upsurge in corporate assets and profits. At the same time, inflation has reduced the market power of the dollar. Adjustments to make antitrust fines more meaningful in the corporate decisionmaking process are essential now.

COST TO THE UNITED STATES

Enactment of H.R. 14116 should not result in increased costs to the United States.

In fiscal year 1969, in 21 criminal Sherman Antitrust Act cases, total fines imposed amounted to \$1,139,576.03. This was an average of \$54,265 per case. For the first 6 months of fiscal year 1970, in 14 criminal Sherman Antitrust Act cases, total fines imposed amounted to \$1,620,500. This was an average of \$115,750 per case.

The following tables set forth antitrust cases in which fines were imposed since July 1, 1968:

ANTITRUST CASES IN WHICH FINES WERE IMPOSED JULY 1, 1968, THROUGH JUNE 30, 1969

Name	Commodity	Fines	Decision
Socony Mobil Oil Co., Inc., et al.	Liquid asphalt.	\$25,000.00	Guilty by jury.
Automotive Service Dealers Association, et al.	Gasoline.	1,026.03	Do.
Hobart Manufacturing Co., et al. ¹	Industrial food machines.	15,000.00	Do.
American Radiator & Standard Sanitary Corp., et al.	Plumbing fixtures (enameled cast iron and vitreous china).	370,000.00	Nolo contendere.
American Bakeries Co., et al.	Bread and baked goods.	5,000.00	Do.
Wilson Sporting Goods Co., et al.	Athletic equipment.	23,000.00	Do.
Laub Baking Co., et al.	Bread and bakery products.	111,500.00	Do.
Ohio Honda Dealers Sales Association, Inc., et al.	Honda motorcycles and parts.	4,750.00	Do.
The Brookman Co., Inc., et al.	Resilient floor covering.	2,000.00	Do.
Owens-Corning Fiberglas Corp., et al.	Acoustical tile ceilings.	74,200.00	Do.
Pioneer Builders, Inc., et al.	Construction-building contractor.	12,500.00	Do.
Columbus Bowling Proprietor's Association.	Bowling establishments.	2,500.00	Do.
Independent Towel Supply Co., et al.	Linen supplies.	35,000.00	Do.
F. W. Means & Co., et al.	Industrial linen supplies.	22,500.00	Do.
Joseph P. Cuddigan, Inc., et al.	Plumbing supplies and fixtures.	113,000.00	Do.
Steiner American Corp., et al.	Linen supplies.	115,000.00	Do.
Robert G. Venn, et al.	Milk and milk products.	45,500.00	Do.
Circle Floor Co., Inc., et al.	Maple flooring jobs.	110,000.00	Do.
N. V. Nederlandsche Combinatie Voor Chemische Industrie, et al.	Quinine and quinidine.	50,000.00	Do.
Lloyd Kent Jones.	Plumbing fixtures.	2,000.00	Do.
United Oil Dealers Associations.	Gasoline.	100.00	Do.
Total.		1,139,576.03	

¹ H. Rept. 1506, 56th Cong., 1st sess. (1900), p. 2. See also H. Rept. 627, pt. 3, 63d Cong., 2d sess. (1912), p. 7, minority views of Mr. Nelson; also Final Report of Temporary National Economic Committee, 77th Cong., 1st sess. (1941), p. 40.

JULY 1 THROUGH DEC. 31, 1969

Name	Commodity	Fines	Decision
Oregon Restaurant and Beverage Association, et al. ¹	Beer.....	\$11,000.00	Guilty by jury.
American Radiator & Standard Sanitary Corp., et al. ¹	Plumbing fixtures (enameled cast iron and vitreous china).	250,000.00	Do.
N. V. Nederlandsche Combinatie Voor Chemische Industrie, et al.	Quinine and quinidine.....	160,000.00	Nolo contendere.
Intercontinental Fur Corp., et al.	Alaska sealskins.....	165,500.00	Do.
Fuel Oil Dealers' Division of the Central Montgomery County Chamber of Commerce, et al.	Fuel oil.....	12,000.00	Do.
Circle Floor Co., Inc., et al.	Maple flooring jobs.....	20,000.00	Do.
Campanella & Cardi Ready-Mix Concrete Co., et al.	Ready mix concrete.....	90,000.00	Do.
General Host Corp., et al.	Bread.....	48,500.00	Do.
Beatrice Foods Co., et al.	Dairy products.....	157,500.00	Do.
New Orleans Chapter, Associated General Contractors of America Inc., et al.	Construction projects.....	80,000.00	Do.
The American Oil Co., et al.	Gasoline.....	550,000.00	Do.
United Concrete Pipe Corp., et al.	Concrete pressure pipe.....	40,000.00	Do.
R. I. Polk & Co., et al.	City directories.....	35,000.00	Contempt.
Dymo & Modulux.....	Portable school buildings.....	1,000.00	Grand jury contempt.
Total.....		1,620,500.00	

¹ On appeal.² Perjury case.

STATISTICAL COMPARISON OF CRIMINAL AND CIVIL ANTITRUST CASES

	Criminal	Civil
Filed:		
Fiscal 1969.....	14	39
1st 6 months of fiscal 1970.....	1	23
Pending:		
July 1, 1968.....	22	75
Jan. 1, 1970.....	15	81

The Attorney General urges prompt enactment of this legislation. Attorney General Mitchell on September 29, 1969, sent the following message to the Speaker:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., September 29, 1969.

The SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: There is enclosed for your consideration and appropriate reference a legislative proposal to increase criminal penalties under the Sherman Antitrust Act.

This proposal would increase from \$50,000 to \$500,000 the maximum fine which may be imposed upon a corporation for a criminal violation of the Sherman Act, (15 U.S.C. 1 *et seq.*) These violations involve principally price fixing, boycotting, allocation of customers, and allocation of territories. It would effect no change in the fine with respect to natural persons.

The maximum fine for violations of the Sherman Antitrust Act was increased to \$50,000 in 1955. Since that time the assets and profits of corporations have increased dramatically, while the purchasing power of the dollar has decreased greatly. Consequently, the basic purpose of such a fine—to punish offenders and to deter potential offenders—are frustrated because the additional profits available through prolonged violation of the law can far exceed the penalty which may be imposed. The \$50,000 statutory maximum makes fines in criminal antitrust cases trivial for major corporate defendants.

To maintain the intended effect of the maximum fine established in the 1955 amendment to the Sherman Act, which is related to corporate profits of 14 years ago, the increase is obviously needed.

It is also needed as an additional tool with which to combat organized crime. The increased penalty will constitute a more effective deterrent against the

invasion or conduct of legitimate business by criminal organizations in ways which violate the antitrust laws.

This proposed increase would be of valuable assistance in the effective enforcement of the Sherman Act in regard to large corporations without placing an undue hardship upon small business enterprises. There is no minimum fine provision and the courts and this Department would continue to exercise discretion in the imposition and the recommendation of fines.

The Department of Justice urges the prompt enactment of this important measure.

The Bureau of the Budget has advised that there is no objection to the submission of this proposal from the standpoint of the administration's program.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

COMMITTEE RECOMMENDATION

The Committee on the Judiciary concurs in the conclusion that the present \$50,000 statutory maximum makes fines in antitrust cases trivial for major corporate defendants. The committee recommends prompt enactment of H.R. 14116.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives there is printed below in roman existing law in which no change is proposed by the bill as reported. Matter proposed to be stricken by the bill as reported is enclosed in black brackets. New language proposed by the bill as reported is printed in italic:

Act of July 2, 1890 (26 Stat. 209), as amended; (title 15, United States Code, secs. 1, 2, and 3)

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further*, That the preceding provision shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by [fine not exceeding fifty thousand dollars] *fine not exceeding five hundred thousand dollars if a corporation or fifty thousand dollars if any other person*, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by [fine not exceeding fifty thousand dollars] *fine not exceeding five hundred thousand dollars if a corporation or fifty thousand dollars if any other person*, or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States

or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction, thereof, shall be punished by **[fine not exceeding fifty thousand dollars]** *fine not exceeding five hundred thousand dollars if a corporation or fifty thousand dollars if any other person*, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

AMENDING EXPEDITING ACT

AMENDMENTS

On page 3, line 11, after the word "of" strike all down to and including the word "justice" on line 19 and insert in lieu thereof "justice."

On page 3, lines 20 and 21, strike "or (3) or a certificate pursuant to (2)".

PURPOSE OF THE AMENDMENTS

The purpose of the amendments is to provide that appeal from a final judgment in a civil antitrust action brought by the United States shall lie directly to the Supreme Court on a finding that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice by order of the district judge upon application of a party.

PURPOSE

The purpose of the proposed legislation, as amended, is to amend the Expediting Act so as to require that final judgments and interlocutory orders in certain civil antitrust cases if appealed, be heard by the circuit courts of appeals.

The bill would amend section of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) providing for a three district judge court in civil actions wherein the United States is the plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, upon the filing by the Attorney General with the district court of a certificate that the cases are of general public importance. The proposal would eliminate the provision that a three-judge court be impaneled. It would however retain the expediting procedure in single judge district courts

The proposal would amend section 2 of the Expediting Act (15 U.S.C. 29, 49 U.S.C. 45), providing that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section of the Expediting Act will lie only in the Supreme Court. Under the proposal only those cases of general public importance would be appealable directly to the Supreme Court and normal appellate review through the courts of appeals with discretionary review by the Supreme Court would be substituted therefor. An appeal shall lie directly to the Supreme Court on a finding that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice by order of the district judge upon application of a party. The proposal also would eliminate the reference in existing law to expedition of civil cases brought by the United States under the original Interstate Commerce Act and subsequent statutes of like purpose

STATEMENT

The Expediting Act became law in 1903, a time when the Sherman Act was relatively new and an untried method of restraining combinations and trusts. There was apprehension that the newly created system of courts of appeals, because of their supposed unfamiliarity with the new law and because of the additional time required by their procedures, would delay and frustrate the efforts to control monopolies. Responding to that concern the Attorney General recommended the expediting legislation and it became law after Congress approved it without debate.

One of the principal arguments offered in support of the proposal is to relieve the Supreme Court of the burden of hearing the numerous cases coming to it

under the Expediting Act. Many civil antitrust cases require the Supreme Court to read thousands of pages of transcript from the district court. A question arises as to the adequacy of the review the Supreme Court can give to those cases in which there are voluminous trial records. Also all the present Justices have, both in and out of Court, asked that these cases go first to the court of appeals. Some of the Justices are of the opinion that adherence to the customary appellate procedure would benefit the Supreme Court by reducing the numbers of matters presented to it. Further, having the initial appellate review in the courts of appeals would be of benefit to the litigants by refining the issues presented to the Supreme Court and also give litigants an opportunity of review of the the district court decrees which are seldom reviewed by the Supreme Court under existing practice.

It is generally conceded that the existing law has permitted more expeditious determinations of civil antitrust cases but the factual situation prevalent when the law was enacted no longer obtains: dilatory practices, such as protracted delays in filing appeals are not now available. Additionally, by permitting appellate review of preliminary injunctions more expeditious treatment of merger cases should obtain since the trial court's decision would be subject to an immediate review prior to a full-blown trial on all the issues.

The committee is of the opinion that the proposed legislation provides a suitable means of meeting the problems arising from the Expediting Act and would assure that the interest of all parties would be protected. Accordingly the committee recommends favorable consideration of H.R. 12807 with amendments.

Attached hereto and made a part hereof are the views of the Department of Justice:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C.

The VICE PRESIDENT,
U.S. Senate, Washington, D.C.

DEAR MR. VICE PRESIDENT: There is enclosed a proposed bill to amend the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 28 and 29, 49 U.S.C. 44 and 45.

The bill would streamline judicial procedure in antitrust litigation and institute procedure for appellate review of interlocutory orders on injunctions.

The bill would amend section 1 of the Expediting Act (15 U.S.C. 28, 49 U.S.C. 44) which provides for a three-judge district court in civil actions where the United States is a plaintiff under the Sherman or Clayton Antitrust Acts or certain sections of the Interstate Commerce Act, when the Attorney General files with the district court of certificate that the case is of general public importance. The section also provides that the hearing and determination of such cases shall be expedited. The amendment would eliminate the provision that a three-judge court be impaneled when the Attorney General files his expediting certificate, but would retain the expediting procedure in single-judge district courts.

The bill would amend section 2 of the act (15 U.S.C. 29, 49 U.S.C. 45), which provides that appeal from a final judgment of a district court in any civil action brought by the United States under any of the acts covered by section 1 of the Expediting Act will lie only in the Supreme Court. The amendment would eliminate direct appeal to the Supreme Court in such actions for all but cases of general public importance, substituting normal appellate review through the courts of appeals with discretionary review by the Supreme Court. The amendment provides that any appeal from a final judgment in a Government civil case under the antitrust laws, or other statutes of like purpose, and not certificated by the Attorney General or the district court as requiring immediate Supreme Court review, will be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to section 1292(a)(1) and 2107 of title 28 of the United States Code, but not otherwise. Any judgments entered by the courts of appeals in such actions shall be subject to review by the Supreme Court upon a writ of certiorari.

The amendment also provides that an appeal and any cross-appeal from a final judgment in such proceedings will lie directly in the Supreme Court if, not later than 15 days after the filing of a notice of appeal, (1) upon application of a party, the district judge who decided the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice, or (2) the Attorney General files in the

district court a certificate containing the same statement. Upon filing of such an order or certificate, the Supreme Court shall either dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law or deny the direct appeal and remand the case to the court of appeals. Review in that court could then go forward without further delay. This is similar to the procedure of the Criminal Appeals Act (18 U.S.C. 3731).

It is desirable, however, that the possibility of immediate review by the Supreme Court be preserved for cases of general public importance in the administration of justice. Such cases will usually involve novel legal questions pertaining to the interpretation or enforcement of the antitrust laws or may have serious legal or economic consequences going beyond the mere private interests of the individual litigants.

The determination of whether a case should be certified directly to the Supreme Court can best be made by the Attorney General or the trial judge who decided the case. It is the public interest in effective antitrust enforcement which primarily dictates the need for any direct appeals, and it is the Attorney General—the chief law officer of the United States—who is in the best position to determine what the total enforcement picture is with respect to a particular case. Though defendants' private interests, which may be of substantial private importance, would not afford a basis for direct appeal to the Supreme Court, the trial judge who heard and decided the case can best evaluate a defendant's claim that immediate Supreme Court review is of general public importance in the administration of justice.

The bill's provisions requiring the Attorney General or the district judge to file the certificate within 15 days after either party has filed its notice of appeal will assure that the opposing party is promptly notified that a direct appeal is involved. And the routing of both appeals and cross-appeals to the Supreme Court by the filing of the certificate will eliminate the delay and confusion of piecemeal appeals.

There is presently considerable uncertainty as to whether the interlocutory appeal statute, 28 U.S.C. 1292(a), is available in cases falling within the Expediting Act. The circuits of the courts of appeals are split on this question (compare *United States v. Ingersoll Rand*, 320 F. 2d 509 (3d Cir. 1963), with *United States v. F.M.C. Corp.*, 321 F. 2d 534 (9th Cir.), application for temporary injunction denied, 84 S. Ct. 4 (1963) (Goldberg, J., in chambers), and *United States v. Cities Service Co.*, No. 7216 (1st Cir., May 8, 1969)), and we think it appropriate to resolve this question with clarifying legislation.

We strongly believe in the desirability of appellate review of district court orders granting, modifying, or denying preliminary injunctions. Such review is generally limited to the outset of a case and would not cause undue delay or disruption. This district court's discretion on injunctions can be reviewed, in substantial part, separately from a determination of the ultimate merits of the case and court of appeals review is not, therefore inconsistent with subsequent direct Supreme Court review of the final judgment in the event of certification. Moreover, the immediate impact of injunctive orders, whether the injunction is granted or denied, calls for appellate review as a matter of fairness. The public interest that possibly unlawful mergers not be consummated until their validity is adjudicated, in addition to the obvious desire of private business to avoid a costly and complicated unscrambling, would, in our view, benefit from making the provisions of 28 U.S.C. 1292(a)(1) available in Expediting Act cases.

These considerations do not apply to appeals of interlocutory orders not relating to injunctions pursuant to 28 U.S.C. 1292(b). That section permits interlocutory appeal of any order made at any time during the district court proceedings, to which that court appends the statutory findings (although the court of appeals may, in its discretion, decline to allow the appeal). One reason against applicability of section 1292(b) is the desire to avoid undue delay and disruption. Antitrust cases are often lengthy and complex, containing sufficient obstacles to expeditious conclusion without increasing the possibilities of interruption for interlocutory appeals. A second reason is the inappropriateness of review of controlling questions of law by a court which later may never get review of the final judgment. The theory of 1292(b) is that the appellate court should have an opportunity to rule early, before getting the final judgment, on questions that may be decisive. It would be anomalous for the courts of appeals to undertake interlocutory resolution of such issues when, at the end of trial, if a certificate is filed, the final judgment would go directly to the Supreme Court.

Finally, we think no useful purpose is served by retaining enforcement proceedings under the Interstate Commerce Act or the Communications Act within the scope of the Expediting Act. The Interstate Commerce Act is expressly included in section 1 of the Expediting Act, while section 401(d) of the Communications Act (47 U.S.C. 401(d)) makes the Expediting Act applicable to cases brought by the United States under sections 201-222 of the Communications Act. We see no need for direct appeal in such cases—indeed, these provisions have rarely been invoked. Therefore we propose that references to the Interstate Commerce Act be stricken from the Expediting Act and that section 401(d) of title 27 be repealed.

The Bureau of the Budget advises that there is no objection to the presentation of this proposed bill from the standpoint of the administration's program.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

That section 1 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44), commonly known as the Expediting Act, is amended to read as follows:

"SECTION 1. In any civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, ["an Act to regulate commerce," approved February 4, 1887,] or any other Acts having like purpose that *have been* or hereafter may be enacted, wherein the United States is plaintiff and equitable relief is sought, the Attorney General may file with the [clerk of such] court, *prior to the entry of final judgment*, a certificate that, in his opinion, the case is of general public importance. [a copy of which shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge) of the circuit in which the case is pending.] Upon [receipt of the copy] *filing* of such certificate, it shall be the duty of the [chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof,] *judge designated to hear and determine the case, or the chief judge of the district court if no judge has as yet been designated, to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.*"

SEC. 2. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C. 45) is amended to read as follows:

[In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from—the final judgment of the district court will lie only to the Supreme Court.]

"(a) *Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of title 28 of the United States Code. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of title 28 of the United States Code but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of title 28 of the United States Code.*

"(b) *An appeal from a final judgment pursuant to subsection (a) shall lie directly to the Supreme Court if:*

(1) *upon application of a party filed within five days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order*

stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice;

[(2) the Attorney General files in the district court a certificate stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.]

A court order pursuant to (1) [or a certificate pursuant to (2) must be filed] within fifteen days after the filing of a notice of appeal. When such an order or certificate is filed, the appeal and any cross-appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. That Court shall thereupon either (1) dispose of the appeal and any cross-appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross-appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a)."

Sec. 3. (a) Section 401(d) of the Communications Act of 1934 (47) U.S.C. 401(d) is repealed.

(b) The proviso in section 3 of the Act of February 9, 1903, as amended (32 Stat. 848, 849; U.S.C. 49 43), is repealed and the colon preceding it is changed to a period.

Sec. 4. The amendment made by section 2 shall not apply to an action in which a notice of appeal to the Supreme Court has been filed on or before the fifteenth day following the date of enactment of this Act. Appeal in any such action shall be taken pursuant to the provisions of section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in effect on the day preceding the date of enactment of this Act.

DEPARTMENT OF JUSTICE,
Washington, D.C., April 25, 1973.

Hon. JOHN V. TUNNEY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR TUNNEY: In my appearance before the Antitrust and Monopoly Subcommittee on March 16, 1973, to discuss S. 782, a bill introduced by you known as the "Antitrust Procedures and Penalties Act," and S. 1088, cited as the "Antitrust Settlement Act of 1973," I was requested to furnish additional information for the record.

First, I was asked to make available samples of the Departments press releases at the time our proposed consent decree was lodged with the court. I am also furnishing an example of the relatively few press releases which we issue prior to the filing of a proposed consent decree, stating that an agreement in principle has been reached between the defendant and the Department. Examples of the press release issued at the time of filing are attached hereto as Exhibit A; a release concerning an agreement in principle entered into with Ling-Temco-Vaught, Inc. and Jones & Laughlin Steel Corp. is attached as Exhibit B.

Second, I was requested to furnish a survey of the length of time involved in cases ultimately settled by consent decree over the last five years. I am enclosing as Exhibit C, a schedule which I believe complies with the request. Based on some rather rough calculations, the average elapsed time from complaint to final consent decree is estimated below:

Average time elapsed

1973	-----	9 months
1972	-----	18 months
1971	-----	18 months
1970	-----	20 months
1969	-----	33 months
1968	-----	23 months
1967	-----	25 months

You also very graciously extended to me the opportunity to enlarge my comments on S. 1088 for inclusion in the record. My major objection to that legislation relates to Section 2(c), which requires the district court to order that a full hearing on the proposed decree be held "unless it finds . . . that there is no

substantial controversy concerning the . . . settlement." I am concerned that the courts will err on the side of perceiving a "substantial controversy" in most of the cases we file, and will in effect read this as a mandatory hearing requirement in all but our more insignificant cases.

I appreciate the opportunity to present this additional information.

Sincerely yours,

THOMAS E. KAUPER,
Assistant Attorney General, Antitrust Division.

Enclosure.

Exhibit A

DEPARTMENT OF JUSTICE

SEPTEMBER 11, 1969

The Department of Justice filed today a proposed antitrust consent decree prohibiting the four major auto manufacturers and the Automobile Manufacturers Association from conspiring to delay and obstruct the development and installation of pollution control devices for motor vehicles.

The decree also requires them to make available to any and all applicants royalty-free patent licenses on air pollution control devices and to make available technological information about these devices.

Attorney General John N. Mitchell said the decree, filed with the United States District Court in Los Angeles, would be submitted to the court for final approval in 30 days. Its provisions would become effective immediately thereafter.

The proposed decree, signed by General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, and the Association, would conclude a civil antitrust suit filed by the Department on January 10, 1969.

Mr. Mitchell said that the proposed decree "represents strong federal action to encourage widespread competitive research and marketing of more effective auto anti-pollution devices."

Mr. Mitchell said that a continuation of the suit—which may have taken years in court litigation—would have delayed Justice Department efforts to end the alleged conspiracy and its efforts to encourage immediate action by the automobile companies.

The Attorney General said that the consent decree should spur aggressive competitive research and development efforts by each auto company and by other companies, and therefore should prove to be a substantial benefit to the health and welfare of all metropolitan area residents—especially those in the Los Angeles Basin which has the most serious smog problem in the nation.

The Attorney General also said that the judgment is in line with the massive anti-smog program announced two weeks ago by Dr. Lee A. DuBridge, President Nixon's science advisor, at a meeting of the President's Environmental Quality Council.

Dr. DuBridge said, "Nowhere is there a greater need for urgency than in the field of air pollution, which affects directly the health and comfort of our people. I think speedy resolution of this case will promote competitive research and development in the design and installation of smog control devices and represents an important step forward in the fight against pollution."

The Department of Health, Education and Welfare, which administers the Clean Air Act, and representatives of the Air Resources Board of the State of California, have expressed satisfaction with the terms of the proposed consent decree.

Assistant Attorney General Richard W. McLaren, head of the Department's Antitrust Division, said the judgment represented a successful conclusion to a suit filed only eight months ago. He pointed out that the Government had achieved all significant relief sought in the complaint and all that could have been obtained after a full trial. In addition, he said, the Government had obtained certain relief pertaining to auto safety.

Moreover, Mr. McLaren noted that the public benefits of the decree will be realized immediately, instead of after protracted and uncertain litigation.

Main provisions of the proposed judgment are:

The auto manufacturers and the Association are prohibited from restraining in any way the individual decisions of each auto company as to the date when it will install emission control devices, and from restricting publicity about research and development in this field:

They are prohibited from agreeing not to file individual statements with governmental agencies concerned with auto emission and safety standards, and from filing joint statements on such standards unless the governmental agency involved expressly authorizes them to do so ;

They are required to withdraw from a 1955 cross-licensing agreement and to grant royalty-free licenses on auto emission control devices under patents subject to the 1955 agreement to all who may request them. The Association is also required to make available all technical reports exchanged by the four auto producers in the past two years under the 1955 agreement ;

They are prohibited from agreeing to exchange their companies' confidential information relating to emission control devices or to exchange patent rights covering future inventions in this area ;

They are ordered to discontinue their joint assessment of patents on auto emission control devices offered to any of them by outside parties as well as their practice of requiring outside parties to license all of them on equal terms.

The original suit, charging violation of the Sherman Act, said the defendants and others delayed the manufacture and installation of auto emission control devices by agreeing to suppress competition among themselves in the research and development of such devices.

To this end, the suit asserted, they agreed that all industry efforts in this field should be undertaken on a non-competitive basis ; that each would install such devices only simultaneously with the others ; and that they would restrict publicity about research efforts in the auto air pollution field.

The complaint charged that on at least three separate occasions the defendants agreed to try to delay the installation of auto emission control devices.

The suit also charged the defendants with having agreed not to compete with each other in the purchase of patent rights covering such devices from outside parties. The suit asserted that the defendants and others had agreed in 1955 to share their patents in this field with each other on a royalty-free basis. In addition, the suit said, they agreed to appraise jointly any patent for an emission control device offered to any one of them by an outside party, and each agreed not to accept a patent license from any outside party without insisting on equal treatment for the others.

Named as co-conspirators in the suit, but not as defendants, were Checker Motor Corporation, Diamond T Motor Car Company, International Harvester Company, Studebaker Corporation, White Motor Corporation, Kaiser Jeep Corporation, and Mack Trucks, Inc.

DEPARTMENT OF JUSTICE

JUNE 10, 1970

The United States District Court in Pittsburgh today entered a consent judgment terminating the Government's antitrust action against Ling-Temco-Vought, Inc., the Department of Justice announced today.

The Government had challenged LTV's acquisition of a controlling stock interest in Jones & Laughlin Steel Corporation. The entry of the judgment followed immediately after the Court filed an opinion granting the Government's motion. The motion was filed on May 6 and a public hearing was held on June 1, 1970.

At the June 1 hearing, concern was expressed by Jones & Laughlin's employees that the acquisition of J&L by LTV might jeopardize the rights of J&L's employees and former employees in various pension and employee benefit programs.

In its opinion the Court conditioned the approval of the judgment on the parties' consent to the entry of an order preserving the integrity of the trust funds. This order was also entered immediately after the filing of the opinion, in which the court upheld the Government's claim that the entry of the Final Judgment is in the public interest and in accord with the dictates of Congress.

By the judgment LTV is given the option to divest itself either of its interest in Jones & Laughlin or its interests in Braniff Airways, Incorporated, and the Okonite Company, a leading wire and cable manufacturer. The divestiture of these two companies, together with LTV's previous disposition of National Car Rental Systems and Wilson's Sporting Goods, will divest LTV of assets in excess of \$656,000,000, the Government asserted.

Such divestiture, together with the judgment's ban on future, large acquisitions will assist in implementing the Congressional purpose to prohibit mergers which constitute a part of, and tend to proliferate, a trend toward further increases in economic concentration, the Department said.

Provisions designed to insure that the viability of Jones & Laughlin, Braniff and Okonite will not be impaired are also contained in the final judgment. The judgment provides that until the divestitures are complete, LTV cannot merge J&L's assets with its own.

Without court approval, LTV is also prohibited from acquiring any interest in excess of 1 percent in any corporation that has assets in an amount over \$100,000,000. J&L is under the same prohibition so long as it is controlled by LTV.

The judgment also prohibits Ling-Temco-Vought, Jones & Laughlin and each of their respective subsidiaries from practicing reciprocity, i.e., the use of their purchasing power to promote sales.

DEPARTMENT OF JUSTICE

APRIL 9, 1971

The Department of Justice objected today to Ling-Temco-Vought, Inc.'s plan of divestiture of the Okonite Company by selling all of its capital stock in Okonite to Omega-Alpha, Inc., controlled by James Ling.

LTV submitted the plan to the Department for approval on March 12 under the terms of a 1970 consent judgment in an antitrust suit against LTV.

The judgment required LTV to divest itself either of its interests in Braniff Airways, Inc., and Okonite or its interests in Jones & Laughlin Steel Corporation.

LTV elected to divest itself of Braniff and Okonite.

As a result of the Department's objection, LTV may not lawfully consummate the transaction until it obtains the approval of the U.S. District Court in Pittsburgh, Pennsylvania, or until the Government withdraws its objection.

The judgment was entered on June 10, 1970, in the Department's suit which was filed on April 14, 1969, challenging LTV's acquisition of Jones & Laughlin.

DEPARTMENT OF JUSTICE

APRIL 30, 1971

The Department of Justice announced today that it has notified the U.S. District Court in Pittsburgh that it plans to withdraw its objections to Ling-Temco-Vought, Inc.'s sale of all of its stock ownership in The Okonite Company to Omega-Alpha, Inc.

At the same time, the Department advised the court that it would apply for a court order to insure that LTV and its enterprises and Omega-Alpha and its enterprises will be completely separated and not affiliated in any way with one another.

The report, to be filed with the court on Monday, May 3, discloses that James Ling and other Omega-Alpha officials have severed all connections with LTV and will sell all their LTV stock as soon as legally permissible to do so under SEC regulations.

The report sets forth the complete details of the \$40,500,000 transaction. LTV is to obtain \$22,000,000 in cash immediately, an additional \$5,000,000 in 120 days, another \$5,000,000 three months later and \$8,500,000 in two installments, half in November, 1972, and half in November, 1973.

The report to be filed outlines representations by Paul Thayer, president and chairman of the LTV Board, that LTV has a cash drain because of its huge outstanding debt. Approximately \$50 million of this amount is short term debt and is due to banks on July 31, 1971.

LTV has requested an extension on the July 31 deadline and has agreed to make substantial payments in order to gain extra time.

LTV plans to make such payments from the proceeds of the Okonite sale and a prior sale of stock in Braniff Airways, Incorporated.

LTV proposes to divest itself of the remainder of its Braniff holdings by offering to holders of its 5 percent debentures maturing in 1988, an exchange of a specified number of shares of LTV common stock and a specified number of shares of Braniff common stock for a specified face amount of such LTV debentures.

Copies of the report to be filed with the court will be made available by the Department for examination in Room 3305, Antitrust Division, Department of Justice, Washington, D.C. Interested persons may also examine all of the documents submitted to the Department containing the parties' representations and undertakings.

DEPARTMENT OF JUSTICE

JULY 31, 1971.

Assistant Attorney General Richard W. McLaren announced today that the Department of Justice and International Telephone and Telegraph Corporation (ITT) have reached an agreement in principle on the terms of consent decrees, which, if approved by the courts, would terminate the Government's antitrust suits challenging ITT's acquisition of Canteen Corp., a Grinnell Corp., and Hartford Fire Insurance Company.

Mr. McLaren said that ITT would be required within two years to divest Canteen Corp. and the Fire Protection Division of Grinnell Corp. and, within three years, to divest either (1) Hartford, or (2) Avis Rent-A-Car, ITT-Levitt and Sons, Incorporated and its subsidiaries, ITT-Hamilton Life Insurance Company, and ITT Life Insurance Company of New York.

In addition, ITT would be prohibited from acquiring any domestic firm with assets of over \$100 million and from acquiring leading firms in concentrated U.S. markets, without the approval of the Department or the court. Under the agreement, a leading firm is defined as one with total annual sales of over \$25 million and holding 15% of any market in which total annual sales exceed \$100 million. A concentrated market is defined as one in which the top four companies account for over 50% of total sales.

ITT would also be barred from acquiring any substantial interest in any domestic automatic sprinkler company or any domestic insurance company with insurance assets exceeding \$10 million.

The agreement would also prohibit the practice of reciprocity—using purchasing power to promote sales—by ITT and all of its subsidiary companies.

Mr. McLaren said that the proposed agreement will assist in stemming the trend toward undue concentration by merger which was alleged in these cases. In addition, he pointed out that most of the companies to be divested are industry leaders which the Department contended would be entrenched in their positions under ITT ownership.

Hartford has annual premiums of about \$1 billion. Canteen, The Grinnell Fire Protection Division, Avis, Levitt, and the two life insurance companies have annual sales of approximately \$1 billion.

The Canteen suit was filed on April 28, 1969. The other two cases were filed on August 1, 1969.

District Courts have ruled against the Government's contentions in the two cases involving Grinnell and Canteen. The Government has appealed the Grinnell case to the Supreme Court and was considering a similar appeal in the Canteen case. The trial of the Hartford case had been scheduled to begin in September.

Attorney General John N. Mitchell did not participate in any aspect of these cases because his former law firm had represented a subsidiary of ITT.

DEPARTMENT OF JUSTICE

AUGUST 23, 1971

The Department of Justice filed proposed consent judgments today which, if approved by the courts, will terminate the Government's antitrust suits challenging International Telephone and Telegraph Corporation's acquisition of Canteen Corporation, Grinnell Corporation and Hartford Fire Insurance Company.

Assistant Attorney General Richard W. McLaren said the judgments, which may become final in 30 days, were filed in the U.S. District Courts in Chicago, Illinois, and Hartford, Connecticut.

Under the judgments, ITT is required within two years to divest Canteen Corporation and the Fire Protection Division of Grinnell Corporation and within three years to divest either Hartford or Avis Rent-A-Car, ITT Levitt & Sons, Inc., ITT Hamilton Life Insurance Company and ITT Life Insurance Company of New York.

In addition, ITT would be prohibited from acquiring any domestic firm with assets of over \$100 million and from acquiring leading firms in concentrated U.S. markets, without the approval of the Department or the court. Under the agreement, a leading firm is defined as one with total annual sales of over \$25 million and holding 15% of any market in which total annual sales exceed \$100 million. A concentrated market is defined as one in which the top four companies account for over 50% of total sales.

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District Courts have ruled against the Government's contentions in the two cases involving Grinnell and Canteen. The Government has appealed the Grinnell case to the Supreme Court and was considering a similar appeal in the Canteen case. . . . The trial of the Hartford case had been scheduled to begin in September.

Attorney General John N. Mitchell did not participate in any aspect of these cases because his former law firm had represented a subsidiary of ITT.

DEPARTMENT OF JUSTICE

NOVEMBER 17, 1971

Attorney General John N. Mitchell announced today that the Department of Justice intends to file a motion jointly with several defendants to amend the 50-year-old consent decree entered in *United States v. Swift & Company, et al.* The amendment would permit limited entry by defendants Swift, Armour, Cudahy and Wilson into product lines now prohibited by the decree.

The defendants, large meat packers, originally consented to the entry of the Packers Decree in 1920 as a means of settling a suit brought by the Government under Sections 1 and 2 of the Sherman Act. The suit charged defendants with a variety of unlawful activities, including price-fixing and abuse of monopoly power in the sale and distribution of meat and other products, principally in food lines.

The Packers Decree prohibits defendants, among other things, from manufacturing, wholesaling or retailing over 100 product lines, ranging from catsup to structural steel. It also prohibits them from acquiring any other firm that manufactures, wholesales or retails the prohibited product lines.

The proposed modification would permit defendants to enter by internal expansion at the manufacturing and wholesaling levels, all product lines now prohibited by the decree.

Defendants could also enter prohibited product lines by the acquisition of other firms, subject to three limitations: first, the acquisition must be a firm in a concentrated industry; second, the firm to be acquired must not be one of the top four firms in the industry; and finally, the firm to be acquired must not account for more than 5% of shipments of the prohibited product line.

The modification would not permit defendants to enter the prohibited product lines at the retail level and it would impose strict restrictions against the use

of the packers' buying or selling power to obtain sales in any of the prohibited product lines, regardless of whether the entry was by internal expansion or by merger.

Deputy Assistant Attorney General Walker B. Comegys said this proposed modification, if accepted by the court, would be procompetitive and in line with the Antitrust Division's current merger enforcement policy which encourages foothold acquisitions in concentrated industries, even by large corporations.

It is also in line with the Division's current policy with respect to decrees of placing time limitations on prohibited conduct which, in and of itself, does not constitute an independent violation of the antitrust laws. After 50 years, the absolute prohibitions against entry have served their remedial purpose.

Moreover, permitting defendants' entry into prohibited product lines would now be in the public interest, because it would provide the real possibility of new competition, particularly in concentrated industries.

The Department of Justice and the defendants have filed a joint notice of their intention to move, in thirty days, to modify the Packers Decree in the U.S. District Court for the Northern District of Illinois, Eastern Division. Interested parties are invited by the Department of Justice to make their views known during this 30-day period.

Exhibit B

DEPARTMENT OF JUSTICE

MARCH 6, 1970

The Department of Justice announced today that agreement had been reached with Ling-Temco-Vought, Inc., and Jones & Laughlin Steel Corporation on the terms of a consent decree that would terminate the Government's antitrust suit against LTV's acquisition of J&L.

The decree would require LTV to divest J&L or, in the alternative, Braniff Airways, Inc. and The Okonite Company; would prohibit LTV from making any major acquisitions for 10 years without the approval of the Government or the court; and would prohibit LTV and J&L, and their subsidiaries, from engaging in reciprocity.

Attorney General John N. Mitchell said that the 23-page proposed judgment would be lodged with the United States District Court in Pittsburgh early next week, and that court approval would be sought after the customary 30-day waiting period.

The Attorney General stated that the proposed judgment "calls for the most substantial corporate divestiture of any antitrust decree in recent years."

J&L has assets of about \$1.1 billion; Braniff, about \$371 million; and Okonite, about \$164 million.

Under the terms of the proposed judgment, LTV must divest itself within three years of its entire interest in J&L, or, in the alternative, its entire interest in both Braniff and Okonite. If divestiture is not completed within three years, the J&L stock owned by LTV must be transferred to a court-appointed trustee for disposal.

The decree requires that, until divestiture is completed, J&L, Braniff, and Okonite must be maintained as viable business entities. To this end, provisions of the decree prohibit the payment of extraordinary dividends and place certain restrictions upon the incurring of debt (other than in the ordinary course of business), the encumbering or disposing of assets, and any recapitalization, reorganization or acquisition by J&L, Braniff or Okonite.

The proposed judgment also would bar LTV for 10 years from acquiring any significant stock interest in any corporation with assets of more than \$100 million without the consent of the Government or the approval of the court. A similar restriction applies to acquisitions by J&L if LTV retains control of that company.

The proposed judgment prohibits LTV and J&L from engaging in reciprocity, the practice of using purchasing power to promote sales. Subsidiaries of LTV and J&L are also required to consent to be bound by the provisions of the decree, including those which prohibit reciprocity.

The consent decree would also dissolve the preliminary injunction under which J&L has been maintained as a separate entity, independent of LTV's control, while the suit was pending.

Since the filing of the antitrust suit in April 1969, LTV has disposed of National Car Rental Systems, Inc. (in 1969), with assets of about \$76 million, and Wilson Sporting Goods Co. (in 1970), with assets of about \$80 million.

Exhibit C

TIME ELAPSED—COMPLAINT TO FINAL CONSENT DECREE

Title of case	Date filed	Date consent entered	Time elapsed (months)
FISCAL 1967			
National Cleaning Contractors, Inc., et al.	Mar. 28, 1966	July 25, 1966	4
Bethlehem Steel Co., et al.	Sept. 28, 1965	Aug. 23, 1966	11
Pyrotronics, Inc.	Oct. 15, 1965	Sept. 12, 1966	11
United Merchants & Manufacturers, Inc.	Nov. 23, 1964	Sept. 14, 1966	22
Jantzen, Inc., et al.	Mar. 10, 1964	Oct. 21, 1966	31
Ehrenreich Photo-Optical Industries, Inc.	Sept. 29, 1966	Oct. 31, 1966	1
World Journal Tribune Inc., et al.	Sept. 14, 1966	Nov. 7, 1966	2
The Valley National Bank of Arizona, et al.	Dec. 28, 1962	Nov. 23, 1966	47
The Bank of Virginia	Sept. 30, 1966	Dec. 27, 1966	3
Broadcast Music, Inc., et al.	Dec. 10, 1964	Dec. 29, 1966	24
Ace Drill Bushing Co., Inc., et al.	Mar. 17, 1966	Jan. 17, 1967	10
American Smelting & Refining Co., et al.	Jan. 19, 1961	Mar. 15, 1967	56
Monsanto Co., et al.	Apr. 13, 1964	Mar. 20, 1967	35
Coast Manufacturing & Supply Co., Inc.	Nov. 23, 1964	do.	28
Burlington Industries, Inc.	do.	do.	28
Clark-Schwebel Fiber Glass Corp.	do.	do.	28
J. P. Stevens & Co.	do.	do.	28
National Steel Corp., et al.	Feb. 15, 1960	Apr. 10, 1967	86
Max Factor & Co.	Dec. 27, 1963	Apr. 20, 1967	40
Lindsay-Schaub Newspapers, Inc.	Mar. 27, 1967	Apr. 27, 1967	1
Armco Steel Corp., et al.	Sept. 28, 1965	May 11, 1967	20
Hat Corp. of America, et al.	June 11, 1965	May 16, 1967	23
Bowling Proprietors' Association of America, Inc.	June 23, 1964	May 19, 1967	35
Herff Jones Co., et al.	Oct. 4, 1965	June 14, 1967	20
Dymo Industries, Inc.	Aug. 3, 1964	June 15, 1967	43
FISCAL 1968			
Pennsylvania Refuse Removal Association, et al.	Oct. 30, 1963	July 5, 1967	45
Gulf & Western Industries, Inc., et al.	July 25, 1967	Aug. 25, 1967	1
Bay West Paper Co.	Apr. 1, 1964	Oct. 9, 1967	42
Peabody Coal Co., et al.	Sept. 21, 1967	Oct. 23, 1967	1
Eversharp, Inc., et al.	Sept. 20, 1967	Oct. 24, 1967	1
D. D. Bean & Sons Co., et al.	Jan. 10, 1966	Nov. 20, 1967	22
Associated Aviation Underwriters, et al.	Aug. 5, 1965	Dec. 1, 1967	28
Essex Wire Corp.	Oct. 31, 1967	do.	1
Curtis Circulation Co., Inc., et al.	June 9, 1965	Dec. 15, 1967	30
The H. E. Koontz Creamery, Inc., et al.	Dec. 21, 1962	Dec. 21, 1967	60
Thomson-Brush-Moore Newspapers, Inc.	Dec. 8, 1967	Jan. 10, 1968	1
Standard Oil Co. (New Jersey), et al.	Apr. 21, 1953	Jan. 24, 1968	177
Pennsalt Chemicals Corp., et al.	Sept. 30, 1966	Jan. 29, 1968	16
The Dentists' Supply Co., of New York	do.	do.	16
American Machine & Foundry Co., Inc., et al.	July 30, 1962	Mar. 7, 1968	68
Blue Chip Stamp Co., et al.	Dec. 26, 1963	Mar. 12, 1968	51
Mercantile Trust Co. National Association, et al.	July 7, 1965	Apr. 4, 1968	33
First National City Bank, et al.	Dec. 30, 1965	May 10, 1968	29
Harper & Row Publishers, Inc.	Apr. 18, 1967	May 17, 1968	13
The Bobbs-Merrill Co., Inc.	do.	do.	13
Childrens Press, Inc.	do.	do.	13
Thomas Y. Crowell Co.	do.	do.	13
Dodd Mead & Co., Inc.	do.	do.	13
E. P. Dutton & Co., Inc.	do.	May 19, 1968	13
Golden Press, Inc.	do.	May 17, 1968	13
Grosset & Dunlap, Inc.	do.	do.	13
Holt, Rinehart & Winston, Inc.	do.	do.	13
Little, Brown & Co., Inc.	do.	do.	13
The Macmillan Co.	do.	do.	13
William Morrow & Co., Inc.	do.	do.	13
G. P. Putnam's Sons	do.	do.	13
Random House, Inc.	do.	do.	13
Charles Scribner's Sons	do.	do.	13
The Viking Press, Inc.	do.	do.	13
Henry Z. Walck, Inc.	do.	do.	13
Franklin Watts, Inc.	do.	do.	13
Burlington Industries, Inc., et al.	Oct. 9, 1964	June 14, 1968	44
Bowling Proprietors' Association of Northern Ohio, Inc.	Sept. 14, 1966	June 21, 1968	21
Independent Body Shop Association of Reno & Sparks, Inc.	Mar. 7, 1968	June 24, 1968	3

Exhibit C—Continued

TIME ELAPSED—COMPLAINT TO FINAL CONSENT DECREE—Continued

Title of case	Date filed	Date consent entered	Time elapsed (months)
FISCAL 1969			
General Motors Corp.	Oct. 16, 1959	July 1, 1968	105
Chicago Linen Supply Association, et al.	Sept. 12, 1966	July 24, 1968	22
National Funeral Directors Association of the United States, Inc.	Nov. 24, 1967	Aug. 19, 1968	9
Champion Papers Inc.	Apr. 19, 1965	Aug. 28, 1968	40
Gestetner Corp.	Oct. 14, 1964	Sept. 3, 1968	47
Third National Bank in Nashville, et al.	Aug. 10, 1964	Sept. 19, 1968	49
Aluminum Limited, et al.	Dec. 30, 1964	Sept. 24, 1968	45
United States Aviation Underwriters, Inc., et al.	Aug. 5, 1965	Oct. 17, 1968	38
Wilson Sporting Goods Company, et al.	Mar. 27, 1968	Oct. 28, 1968	7
First National Bank & Trust Co. of Lexington, et al.	Mar. 1, 1961	Oct. 14, 1968	90
The E. W. Scripps Co.	May 27, 1964	Nov. 12, 1968	53
Gannett Co., Inc., et al.	Dec. 5, 1968	Jan. 7, 1969	1
Globe Ticket Co., et al.	Jan. 24, 1968	Feb. 11, 1969	31
B & W Market, et al.	July 8, 1968	Feb. 25, 1969	6
Florists' Transworld Delivery Association	Sept. 1, 1966	Mar. 20, 1969	31
Martin Linen Supply Company, et al.	Apr. 30, 1969	June 2, 1969	1
Oregon Athletic Equipment Co., Inc., et al.	Aug. 1, 1968	June 12, 1969	10
FISCAL 1970			
Union Camp Corp., et al.	Nov. 4, 1968	July 1, 1969	8
The College of American Pathologists	July 7, 1966	July 14, 1969	36
Quaker State Oil Refining Co.	June 23, 1969	July 23, 1969	1
Socony Mobil Oil Co., Inc., et al.	Apr. 5, 1966	July 24, 1969	39
American Bakeries Co., et al.	Dec. 11, 1967	July 31, 1969	19
Bardahl Manufacturing Corp., et al.	June 30, 1969	Aug. 11, 1969	1
F. & M. Schaefer Brewing Co., et al.	Dec. 20, 1962	Aug. 19, 1969	80
United States Steel Corp.	June 13, 1969	Aug. 25, 1969	2
Minnesota Mining & Manufacturing Co.	Apr. 7, 1966	Sept. 2, 1969	41
Gould, Inc.	Aug. 1, 1969	Sept. 3, 1969	1
Laub Baking Co., et al.	Nov. 14, 1967	Sept. 8, 1969	22
R. J. Reynolds Tobacco Co. (formerly Peneck & Ford Ltd., Inc.)	Apr. 6, 1965	Sept. 22, 1969	53
Ilco Corp.	July 11, 1969	Oct. 6, 1969	2
Farbenfabriken Bayer, A. S.	Mar. 7, 1968	Oct. 24, 1969	18
Scott Paper Co.	Nov. 29, 1968	do.	11
First National Bank of Hawaii, et al.	June 10, 1966	Nov. 17, 1969	41
Marshall & Ilsley Bank Stock Corp., et al.	Mar. 2, 1961	Dec. 1, 1969	105
Western Farmers Association	Feb. 19, 1969	Dec. 8, 1969	10
Deposit Guaranty National Bank of Jackson, et al.	May 28, 1968	Dec. 26, 1969	19
The Standard Oil Co.	Dec. 1, 1969	Jan. 1, 1970	1
Witco Chemical Corp.	July 24, 1969	Jan. 12, 1970	6
Sonoco Products Co.	Aug. 2, 1967	Jan. 22, 1970	29
Wisconsin Alumni Research Foundation	Dec. 30, 1969	Jan. 30, 1970	1
Emhart Corp.	July 11, 1969	Feb. 24, 1970	7
American Pipe & Construction Co., et al.	Dec. 21, 1964	Feb. 26, 1970	62
Iowa Beef Packers, Inc., et al.	Feb. 24, 1969	Mar. 20, 1970	13
Viking Carpets, Inc.	Feb. 19, 1970	Mar. 23, 1970	1
Times Printing Co.	Feb. 24, 1970	Mar. 27, 1970	1
Automobile Manufacturers Association, Inc., et al.	Jan. 10, 1969	Mar. 31, 1970	14
Sargent & Co.	July 11, 1969	Apr. 8, 1970	9
Northern Natural Gas Co.	Mar. 31, 1970	May 5, 1970	1
The Mead Corp.	July 8, 1968	May 14, 1970	22
Hart, Schaffner & Marx	Nov. 13, 1970	June 1, 1970	19
Summons Co.	Apr. 4, 1970	June 4, 1970	2
Ling-Temco-Vought, Inc., et al.	Apr. 14, 1969	June 10, 1970	14
Joseph P. Cuddigan, Inc., et al.	Sept. 12, 1967	June 15, 1970	33
FISCAL 1971			
Inland Steel Co.	June 1, 1970	July 1, 1970	1
J. P. Stevens & Co.	June 30, 1970	July 2, 1970	1
Archer-Daniels-Midland Co., et al.	June 15, 1970	July 15, 1970	1
Bunge Corp.	do.	do.	1
New Orleans chapter, Associated General Contractors of America, Inc.	Jan. 28, 1964	July 17, 1970	78
Continental Grain Co.	June 15, 1970	July 21, 1970	1
American Steamship Co., et al.	June 22, 1970	July 29, 1970	1
Republic Steel Corp.	June 29, 1970	July 30, 1970	1
Spring Mills, Inc.	June 30, 1970	July 31, 1970	1
M. Lowenstein & Sons	do.	do.	1
Cannon Mills	do.	do.	1
West-Point-Pepperill, Inc.	do.	do.	1
Arnold Bakers, Inc.	June 29, 1962	Aug. 3, 1970	97
American Angus Association	Jan. 15, 1968	Aug. 13, 1970	31
Pennsalt Chemicals Corp.	Dec. 24, 1964	Aug. 25, 1970	68
First at Orlando Corp., et al.	Dec. 23, 1969	Aug. 27, 1970	8
Armco Steel Corp.	July 31, 1970	Aug. 31, 1970	1
Virgin Islands Gift & Fashion Shop Association, et al.	Sept. 10, 1969	Sept. 9, 1970	12
Independent Towel Supply	Dec. 11, 1968	Sept. 23, 1970	21
The General Tire & Rubber Co., et al.	Mar. 2, 1967	Oct. 21, 1970	42
Anthracite Export Association, et al.	Nov. 10, 1965	Nov. 12, 1970	60
National Bank & Trust Co. of Central Pennsylvania, et al.	Dec. 11, 1969	Dec. 7, 1970	12
PPG Industries, Inc.	Nov. 6, 1970	Dec. 9, 1970	1

Exhibit C—Continued

TIME ELAPSED—COMPLAINT TO FINAL CONSENT DECREE—Continued

Title of case	Date filed	Date consent entered	Time elapsed (months)
FISCAL 1971—Continued			
Bethlehem Steel Corp.	Nov. 10, 1970	Dec. 11, 1970	1
Prince George's County Board of Realtors, Inc.	Dec. 18, 1969	Dec. 28, 1970	12
Semmonds Precision Products, Inc.	Nov. 15, 1967	Dec. 31, 1970	37
Continental Oil Co., et al.	Apr. 30, 1969	Jan. 20, 1971	21
Burlington Northern, Inc.	Dec. 22, 1970	Jan. 25, 1971	1
Ciba Corp., et al.	July 17, 1970	Feb. 3, 1971	6
Kennecott Copper Corp.	Jan. 11, 1971	Feb. 17, 1971	1
Evans Products Co.	Mar. 6, 1970	Feb. 25, 1971	11
General Host Corp., et al.	Mar. 13, 1968	Mar. 1, 1971	36
National Steel Corp.	Feb. 26, 1971	Mar. 29, 1971	1
Schenley Industries, Inc., et al.	Apr. 25, 1966	do	59
General Adjustment Bureau, Inc.	Mar. 11, 1971	Apr. 15, 1971	1
Atlantic Richfield Co., et al.	Jan. 15, 1969	Apr. 20, 1971	27
American Radiator & Standard Sanitary Corp., et al.	Oct. 6, 1966	May 18, 1971	54
Webster Electric Co., Inc.	May 3, 1971	June 2, 1971	1
Aluminum Co. of America	May 26, 1971	June 28, 1971	1
FISCAL 1972			
Reynolds Metals Co.	July 14, 1971	Aug. 16, 1971	1
Florida Power Corp., et al.	July 8, 1968	Aug. 19, 1971	37
Combustion Engineering, Inc.	Sept. 1, 1970	Sept. 8, 1971	12
Kansas City Music Operators Association, et al.	Mar. 30, 1970	Sept. 19, 1971	18
International Telephone & Telegraph, Corp.	Apr. 28, 1969	Sept. 24, 1971	29
International Telephone & Telegraph Corp., et al.	Aug. 1, 1969	do	25
Work Wear Corp.	June 28, 1968	Sept. 27, 1971	39
Asiatic Petroleum Corp., et al.	Dec. 8, 1970	Oct. 4, 1971	10
The Higbee Co.	Dec. 22, 1969	do	22
American Oil Co., et al.	Apr. 8, 1965	Oct. 18, 1971	78
Tidewater Marine Service Inc., et al.	Jan. 16, 1968	Oct. 26, 1971	45
Toro Manufacturing Corp.	July 1, 1969	Nov. 12, 1971	28
Tandy Corp., et al.	May 14, 1971	Jan. 28, 1972	8
The Atlanta Real Estate Board	Feb. 17, 1971	Feb. 4, 1972	12
The Owensboro National Bank, et al.	Nov. 18, 1970	Feb. 9, 1972	15
Metro Denver Concrete Association, et al.	Aug. 6, 1970	Feb. 28, 1972	18
W. R. Grace & Co.	Jan. 28, 1972	Feb. 29, 1972	1
Jackson's Atlanta Ready Mix Concrete Co., Inc., et al.	do	Mar. 1, 1972	1
Owens-Illinois, Inc.	do	do	1
Venice Work Vessels, Inc.	Nov. 6, 1967	Mar. 9, 1972	52
Yoder Brothers, Inc., et al.	Apr. 20, 1970	Mar. 15, 1972	23
Martin-Marietta Corp.	Feb. 28, 1972	Apr. 4, 1972	1
Beatrice Foods Co., et al.	June 26, 1969	May 7, 1972	34
H. K. Porter Co., Inc.	Apr. 12, 1972	May 17, 1972	1
Darleny-Delaware, Inc., et al.	Dec. 17, 1970	May 30, 1972	17
American Society of Civil Engineers	May 1, 1972	June 1, 1972	1
Wayne Corp.	May 4, 1972	June 6, 1972	1
The Overhead Door Distributors' Association of Greater Delaware Valley	Jan. 27, 1972	June 16, 1972	5
American Institute of Certified Public Accountants, Inc.	June 1, 1972	June 19, 1972	1
Heyward Allen Motor Company, Inc., et al.	Apr. 8, 1971	June 26, 1972	14
FISCAL 1973			
American Institute of Certified Public Accountants, Inc.	June 1, 1972	July 6, 1972	1
Wolverine World Wide, Inc.	Oct. 19, 1971	July 10, 1972	9
The Cleveland Real Estate Board	July 29, 1970	July 19, 1972	24
Harvey Hakkell, Inc.	Apr. 28, 1971	July 21, 1972	15
Memphis Board of Realtors	June 27, 1972	July 27, 1972	1
Bird Corporation, et al.	do	do	1
T.I.M.E.-DC, Inc.	June 30, 1972	July 31, 1972	1
Long Island Board of Realtors, Inc.	Nov. 17, 1970	Aug. 1, 1972	21
Westinghouse Electric Corp.	June 23, 1972	do	1
Uniroyal, Inc.	June 29, 1972	Aug. 15, 1972	1
Converse Rubber Corp., et al.	July 3, 1972	Aug. 29, 1972	2
The Wachovia Bank and Trust Co., N.A.	June 22, 1971	Sept. 5, 1972	15
The American Society of Mechanical Engineers, Inc., et al.	July 22, 1970	Sept. 11, 1972	26
Bally Manufacturing Corp.	June 29, 1972	Oct. 2, 1972	3
Tulsa Bottlers Association, et al.	June 29, 1972	Oct. 11, 1972	3
Richter Concrete Corp., et al.	Nov. 16, 1970	Oct. 20, 1972	23
KDI Corp., et al.	Oct. 1, 1971	Nov. 20, 1972	13
Sweetheart Bakers, Inc., et al.	July 29, 1971	Nov. 27, 1972	16
The E. H. Koester Bakery Co., et al.	do	do	16
Safety First Products Corp.	May 23, 1972	Nov. 30, 1972	6
American Ship Building Co., et al.	Aug. 16, 1972	Jan. 8, 1973	5
Southeastern Peanut Association	June 30, 1972	Jan. 15, 1973	7
Southwestern Peanut Shellers Association	do	do	7
Nissan Motor Corp. in U.S.A.	do	Feb. 26, 1973	8
Crane Co.	Jan. 23, 1973	Mar. 1, 1973	1
Yellow Freight System, Inc.	Oct. 26, 1972	Mar. 6, 1973	4
Los Angeles Realty Board, et al.	Dec. 18, 1970	Mar. 19, 1973	27
The Material Handling Institute, Inc., et al.	Aug. 10, 1972	Mar. 21, 1973	7

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ANTITRUST PENALTIES AND ATTITUDES TOWARD RISK: AN ECONOMIC ANALYSIS

William Breit * and Kenneth G. Elzinga **

The tools of economic analysis have too infrequently been applied to evaluations of the deterrent efficacy of penalties for statutory violations. The authors help remedy this deficiency by using economic analysis to examine the existing mechanisms which are used to deter antitrust violations. They point particularly to the critical importance of analyzing the risk attitudes of management in any attempt to arrive at an optimal antitrust policy, and urge the replacement of the current arsenal of antitrust weapons, insofar as they are directed at deterrence, with the unitary device of a fine based upon a percentage of corporate profits.

WITHIN the past decade, the tools of economic analysis have been increasingly applied to areas outside the traditional focus of economic scrutiny. Such applications have been particularly useful in analyzing current methods of controlling and deterring criminal activities.¹ Thus far, however, no one has systematically applied modern economic theory to an analysis of the penalties for antitrust violations.² This article will at-

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¹ The work of Gary Becker in this area has been particularly outstanding. See Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). See also Schelling, *Economic Analysis and Organized Crime*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 114 (1967). The earliest work relating economics to law is that of Cesare Beccaria in *Dei Delitti e Delle Pene*, published in 1764. Jeremy Bentham as well must be considered a precursor of those currently applying economic analysis to legal problems. See J. BENTHAM, THE THEORY OF LEGISLATION (1931 ed.).

² Until now, most studies of the operation of the antitrust laws have been more empirical than theoretical in nature. See, e.g., Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951); Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J. LAW & ECON. 43 (1969); Stigler, *The Economic Effects of the Antitrust Laws*, 9 J. LAW & ECON. 225 (1966). Those few analyses that have been theoretical have not been directed at the issue of the comparative efficiency of the available antitrust deterrent mechanisms. Oliver Williamson's efforts to apply economic theory to the antitrust area have been restricted to the problems of economies of scale in antimerger cases, see William-

tempt to remedy this deficiency by applying economic theory to an examination of the deterrent value of current federal antitrust policies and penalties;³ as will be shown, this application is especially called for in light of the changing attitudes toward risk of American corporate management. After identifying the currently used deterrent mechanisms and some of their costs, we shall demonstrate the importance of determining management's attitude toward risk to the development of efficient antitrust enforcement. Then, on the basis of some conclusions we shall draw as to the attitudes of present day corporate managers toward risk, we shall put forth specific proposals for reform consistent with the implications of our economic analysis.

I. ALTERNATIVE MEANS OF DETERRENCE

Under the current federal statutory framework, the judiciary can impose on antitrust violators four kinds of penalties, all of which have the potential to deter future monopolistic behavior:⁴ 1) the payment of fines to the Government;⁵ 2) the payment of treble damages to injured parties;⁶ 3) imprisonment;⁷ and 4) an order directing corporate dissolution.⁸ By affecting the prob-

son, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968), and of applying § 2 of the Sherman Act to cases of structural dominance. See Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972). Richard A. Posner's work has used economic analysis to argue that the Antitrust Division of the Department of Justice should direct its resources only at those practices that most clearly reduce economic output. See Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971).

³ Our focusing on the deterrent as opposed to the compensatory effect of antitrust penalties reflects our strong belief that it is largely from the deterrent viewpoint that these penalties should be evaluated. It is true that legal scholars have disagreed as to whether the primary legislative purpose in enacting the antitrust penalties was to deter future violations or to compensate injured parties. However, at least from the perspective of economics, the deterrent arguments seem much the more appealing. The party who is injured by monopolistic behavior is not just a given individual but rather society as a whole. By misallocating resources, monopoly causes too few goods to be produced and thereby directs scarce resources into the production of commodities that are less valuable. In this way the real income of all of society is reduced. Only to the extent that antitrust violations are deterred can such income losses be avoided.

⁴ In our analysis, "monopolistic" or "anticompetitive" activity will refer to any behavior on the part of businessmen which causes price to diverge from marginal cost.

⁵ E.g., 15 U.S.C. §§ 1-2 (1970).

⁶ 15 U.S.C. § 15 (1970).

⁷ E.g., 15 U.S.C. §§ 1-2 (1970).

⁸ The federal courts are authorized to "prevent and restrain" antitrust violations. 15 U.S.C. § 4 (1970). This power has for many years been interpreted

ability of violations being detected, a fifth factor, the intensity with which antitrust laws are enforced and with which violations are investigated, also has a potentially significant impact on the level of deterrence.

In our attempt to identify an optimum mix of deterrent mechanisms, we shall immediately eliminate from consideration the alternatives of heavy reliance on either imprisonment or dissolution. The provisions for imprisonment in the Sherman Act historically have been applied primarily to business racketeers, labor union leaders, and suspected spies.⁹ The infrequency with which incarceration has been imposed on "simple" antitrust violators in itself may reflect a wholly appropriate judicial skepticism toward the efficacy of using imprisonment to deter monopolistic behavior.¹⁰ The very high societal costs that would accompany an expanded use of the imprisonment alternative — costs in the form of guards, wardens, psychologists, probation officers, and the violators' time — are excessive,¹¹ in view of the availability, discussed below, of a much more efficient deterrent alternative.

Several factors compel us to reject as well any expanded use of corporate dissolution orders as a means of deterring antitrust violations. First, empirically it appears that even when called for in court orders, comprehensive implementation of meaningful structural reorganization seldom occurs.¹² This enforcement failure can be traced to the dynamics of the enforcement bureaus themselves. The difficult task of physically unscrambling a business firm may be of peripheral institutional importance to an agency judged primarily by the number of cases it files and wins. In these bureaus the consummate goal is to win the antitrust case; after the victory, the trial lawyers — those people most familiar with the case — leave the implementation of relief to

broadly to allow the courts to "dissolve" illegal combinations. See *Standard Oil Co. v. United States*, 221 U.S. 1, 78 (1911) (requiring the Standard Oil monopoly to divest itself of interests in numerous other companies).

⁹ W. HAMILTON & I. TILL, *ANTITRUST IN ACTION* 78-79 (TNEC Monograph No. 16, 1941). In the first five decades of the Sherman Act, only one "respectable man of business [went] to jail." *Id.* at 79. The first jail sentence for "pure" pricefixing was not imposed until the late 1950's. Even since then, only a small number of business conspirators have received nonsuspended jail sentences. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 389-91 (1970).

¹⁰ Of course, it also reflects a societal judgment that antitrust violators do not deserve the moral reprobation of the criminal law.

¹¹ These costs have moved Gary Becker to argue that institutionalization should seldom be used to penalize *any* criminal offenses. Becker, *supra* note 1, at 193-98.

¹² M. GOLDBERG, *THE CONSENT DECREE: ITS FORMULATION AND USE* (1962); Adams, *supra* note 2, at 33; Elzinga, *supra* note 2, at 46-53.

those who may see little gain to themselves from the use of the corporate scalpel. With little effective post-trial monitoring by the judiciary, the line of least resistance for bureau officials is to be conciliatory rather than aggressive toward those business managers with whom the detailed implementation of a court order must be negotiated.

A second reason for rejecting dissolution as an antitrust deterrent is simply that it is not so used in the present enforcement framework. Dissolution is generally employed only in civil antitrust suits involving mergers or single firm monopolies where, at least as a formal matter, it is seen as a remedy for an anticompetitive structural situation; its purpose is not deterrence. For example, in the recent ITT consent decree, most of the assets originally listed in the Government's complaint remained untouched by the settlement. One of the reasons given by former Antitrust Division chief Richard McLaren was that divestiture of those assets would adversely affect ITT's stock prices and therefore penalize its shareholders.¹³

Finally, as with incarceration, dissolution, if used extensively, would employ excessive amounts of scarce judicial and administrative resources. Although dissolution represents a deterrent in the sense that few potential cartelists would overlook the risk that monopolistic behavior might carry with it the penalty of breaking up their firms, the costs it imposes make other deterrent alternatives far more attractive. Only when highly significant remedial benefits (in addition to deterrent benefits) can be gained from corporate surgery should dissolution be used.

With imprisonment and dissolution being inappropriate deterrent tools, Congress can best deter anticompetitive behavior by manipulating the three remaining variables. For instance, heavier reliance could be placed on the enforcement budget: the probability of any given antitrust violator being apprehended and convicted could be raised by increasing the amount of resources devoted to the detection of such behavior. This would involve expanding the budgets of the Antitrust Division of the Department of Justice and the Federal Trade Commission. Such an approach has recently been recommended both by an antitrust study group led by Ralph Nader¹⁴ and by a former director of the Federal Trade Commission's Bureau of Economics.¹⁵

A second option, one recommended by President Nixon's Task

¹³ S. EXEC. REP. NO. 92-19, 92d Cong., 2d Sess., pt. 4, at 60 (1972).

¹⁴ M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 129-30 (Nader Study Group Report) (1972). The study group recommended an increase from the Division's "absurdly low" present budget of approximately \$12 million to "at least \$100 million." *Id.* at 122, 129-30.

¹⁵ W. MUELLER, *A PRIMER ON MONOPOLY AND COMPETITION* 177 (1970).

Force on Productivity and Competition,¹⁶ would be to increase the fine for anticompetitive behavior and thereby place heavier reliance on that variable. Some members of Congress, too, have been attracted to this alternative. Senator Hart has recommended legislation which would raise the maximum fine for a Sherman Act violation from \$50,000 per count to \$500,000.¹⁷

Finally, the amount of reparations paid to injured private parties could be increased and could play a greater role in anti-trust deterrence. This could be done through a shift from treble to quadruple or quintuple damages.¹⁸ The same effect could of course be achieved by easing the plaintiff's tasks in private anti-trust suits in any of a number of ways: by further expanding the rules of standing;¹⁹ by extending the statute of limitations on private actions;²⁰ by reducing standards of proof of damages;²¹ or by further facilitating the initiation of class actions.²²

From the point of view of the businessman, the choice between heavy reliance on fines and heavy reliance on reparations involves a distinction without a difference; the businessman is largely indifferent between paying a dollar to an individual in reparations and paying a dollar to the Government in fines. The *societal* costs of the two alternatives, however, are not the same. While the imposition of fines is not costless, as we shall see, still the costs of a fine-imposing procedure are considerably less than those associated with a private damage reparations action. In stark contrast to a deterrent system relying on fines, a reparations system demands the expenditure of real resources in the determination and allocation of the damages themselves. In addition, as now constituted, the reparations system involves resource consuming mechanisms of private pleadings and discovery, joinder,

¹⁶ 2 ANTITRUST L. & ECON. REV. 13, 33 (1969) (statement of George Stigler).

¹⁷ See M. GREEN, *supra* note 14, at 171.

¹⁸ The treble damage action was made a part of the Sherman Act only in the late stages of its drafting. Senator Sherman's original bill called for double damages. It was Senator Hoar's revision that increased the multiple to three. H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 191, 213 (1954).

¹⁹ See Comment, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964); 82 HARV. L. REV. 1374 (1969).

²⁰ See W. Erickson, *Dissolution and Private Damages in Private Antitrust* (no date), at 6 (unpublished paper on file at the *Harvard Law Review*). Erickson cites the present statute of limitations as one of the reasons for the ineffectiveness of private damage suits.

²¹ See Rowley, *Proof of Damages in Antitrust Cases*, 32 ANTITRUST L.J. 75 (1966).

²² See Comment, *Appealability of a Class Action Dismissal: The 'Death Knell' Doctrine*, 39 U. CHI. L. REV. 403 (1972); 86 HARV. L. REV. 438 (1972), noting *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

class actions, multidistrict litigation, and all the other paraphernalia of private damage actions.²³

Moreover, only in a fine system will the Government be able closely to control the degree to which costly resources are devoted to the enforcement of antitrust legislation. A governmental decision to increase or decrease society's expenditures on the detection of violations and the imposition of penalties against them can be most effectively implemented only when the Government actually controls the mechanisms which initiate enforcement. In a fine-oriented system, the Government initiates enforcement activity; in a reparations-oriented system, private parties, concerned not with efficient deterrence of violations but rather with their own individual welfare, initiate the expenditure of both their own and the Government's resources in enforcement activities. With dollar amounts of penalties held constant, then, it appears that a fine system is less costly and more efficient than a reparations system.²⁴

From a more philosophical standpoint as well, we should note that private antitrust suits are undesirable. They have been seen as a type of vigilante justice wholly inappropriate for governing the business sector. Thurman Arnold, although himself an unquestionably staunch proponent of the regulation of anticompetitive behavior, nevertheless argued forcefully that private enforcement leads to a disrespect for the institution of law and "can only be justified as a transitory necessity to meet an emergency situation."²⁵

We are left then with the question of whether heavy reliance on fines or heavy reliance on the enforcement budget would be likely to provide the more efficient means to effect antitrust deterrence. Of course, the answer to this question depends on the respective costs involved, costs which will be noted at a later point in our analysis. However, the answer obviously depends

²³ Private antitrust suits are at the heart of the recent increase in antitrust litigation; the number of these suits has more than tripled in the past decade. 1971 ANNUAL REP. OF THE DIRECTOR OF THE ADM. OFFICE OF THE U.S. COURTS 185 (1972). More to the point, the disproportionate amount of judicial and litigative resources consumed by antitrust cases is evidenced by the high time study weight assigned them by the Administrative Office of the U.S. Courts. *See id.* at 174, 312.

²⁴ Of course, compensatory as well as deterrent benefits would be reaped from a reparations-oriented system. However, as indicated in note 3 *supra*, we feel that alternative antitrust enforcement systems should be evaluated far more on the basis of their deterrent than their compensatory impact.

²⁵ T. ARNOLD, *THE BOTTLENECKS OF BUSINESS* 166 (1940). Arnold felt that "[p]rivate enforcement of *any* public law will make of it an instrument detached from its real purpose." *Id.* (emphasis in original).

as well on the relative benefits from trying to deter monopolistic behavior by relying heavily on enforcement or by relying heavily on fines. This relation in turn is a function of the attitudes of the businessman toward risk. Consequently, it is now appropriate to examine the meaning of risk preference as it relates to managerial behavior.

II. RISK PREFERENCE AND ANTITRUST POLICY

An illustration comparing a given large loss with a given smaller loss will prove instructive in clarifying the meaning of risk preference. Assume that the large loss is ten times the smaller loss. The expected value of these two losses is said to be equal if the probability of the occurrence of the small loss is ten times as great as that of the large loss. However, although the expected values are the same, individuals may have different expected disutilities from these losses depending upon their attitudes toward risk. The risk averse person will prefer the large probability of the small loss to the small probability of the large loss. The risk preferrer, on the other hand, will prefer the small probability of the large loss to the larger probability of the smaller loss. More technically, for the risk averse person the disutility of the larger loss is more than ten times as great as the disutility of the smaller loss. For the risk preferrer, the larger loss disutility is less than ten times that of the smaller loss.

Let us apply this risk attitude analysis to our antitrust policy problem of choosing between a primarily fine-oriented and a primarily detection-oriented deterrence system. Assume that the enforcement agencies are considering two alternative proposals. The first calls for both the imposition of a higher fine on convicted antitrust violators and a reduction in the amount of resources going into detection and conviction. The second calls for reducing the financial penalties, but also for increasing the resources devoted to enforcement, thereby causing an increase in the probability of detection and conviction. Let us assume further that the high financial penalty is ten times the lower penalty, but that because of the difference in the quantity of resources devoted to enforcement, the probability of being required to pay the lower penalty is ten times as great as the probability of being required to pay the high penalty. On these assumptions, the expected value of monopoly profits under either proposal is the same. The businessman's expected utility from antitrust violations, however, will vary depending upon his attitude toward risk. The risk averse manager's attitudes will lead him to conclude more under the policy involving the larger probability of

paying the smaller financial penalty. The risk preferrer, on the other hand, will collude more under the proposal involving the smaller probability of the large penalty.

The indifference maps of Figure 1 (p. 701) provide graphic illustration of the attitudes of both a risk preferrer and a risk averter. On the horizontal axes of Panels *A* and *B* we measure the probability of detection and conviction of antitrust violations. On the vertical axes we measure fines paid when the firm is apprehended and convicted of restraints of trade.²⁶ In contrast to relative magnitudes under the usual construction of such diagrams, the magnitudes measured on each axis become *smaller* as we move away from the origin. The indifference curves depicted shall be called "iso-expected utility" curves. They show for a given businessman combinations of antitrust policies associated with a particular expected utility from monopoly profits. A movement along any curve indicates the amount by which a decrease in the use of one policy instrument must be compensated by an increase in employment of the other instrument in order for a given businessman to maintain a given degree of utility from monopolistic activity. As the businessman moves out to higher iso-expected utility curves — that is, as he moves further away from the origin — the greater satisfaction which he can achieve from monopoly profits will encourage him to engage in more anticompetitive behavior.

In Panel *A*, we depict the case in which the manager is a risk preferrer. His indifference curves indicate that a relatively small reduction in the probability of apprehension and conviction must be compensated by a relatively large increase in financial penalties in order for him to maintain any given degree of expected utility from his monopolistic behavior. Precisely the opposite attitude is depicted in Panel *B*. There we see a case of a risk averse manager in which a relatively large reduction in the probability of detection and conviction needs to be compensated by only a relatively small increase in penalties in order to maintain any given expected utility.

The implications of attitudes toward risk for antitrust policy can be illustrated by superimposing the expected utility indifference curves of the risk preferrer (the curves depicted as *P*) on those of the risk averter (the curves depicted as *A*). This is done in Figure 2 (p. 702). Let us assume that in terms of current ex-

²⁶ The magnitude of fines is independent of the probability of conviction and detection. Congress could increase the fines and not vote any additional resources to the enforcement agencies; furthermore, increased fines provide no significant inducement to private parties either to prosecute or to inform the Government of antitrust violations.

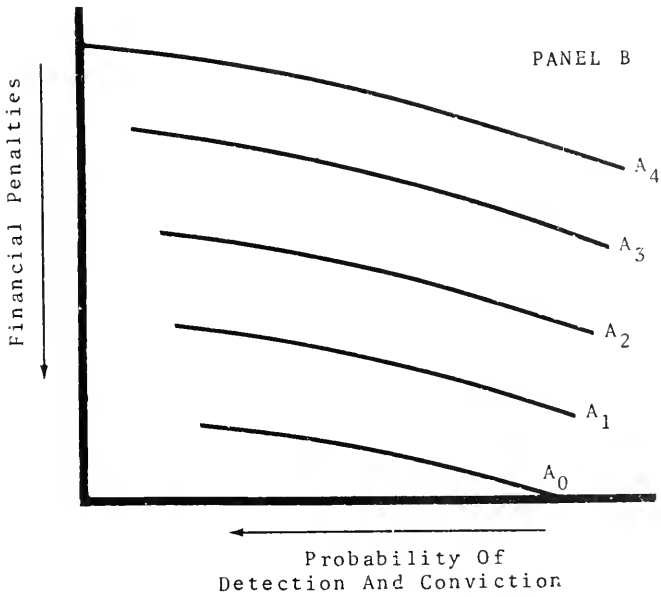
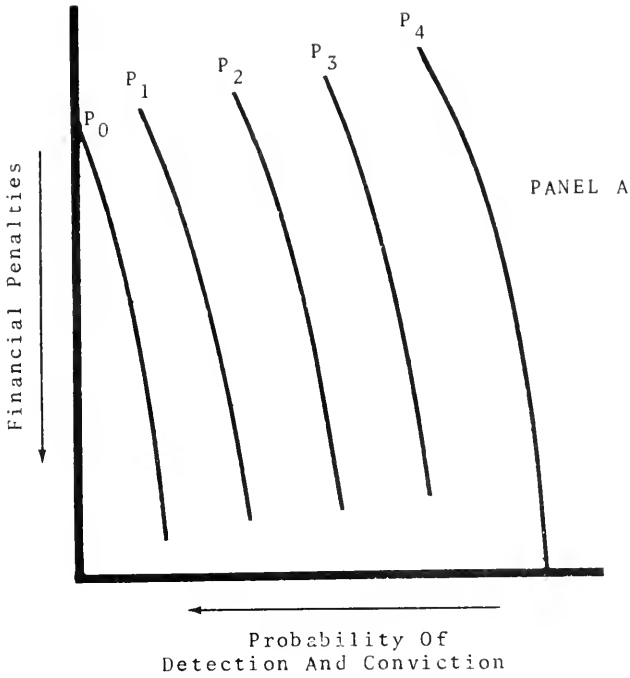


FIGURE 1

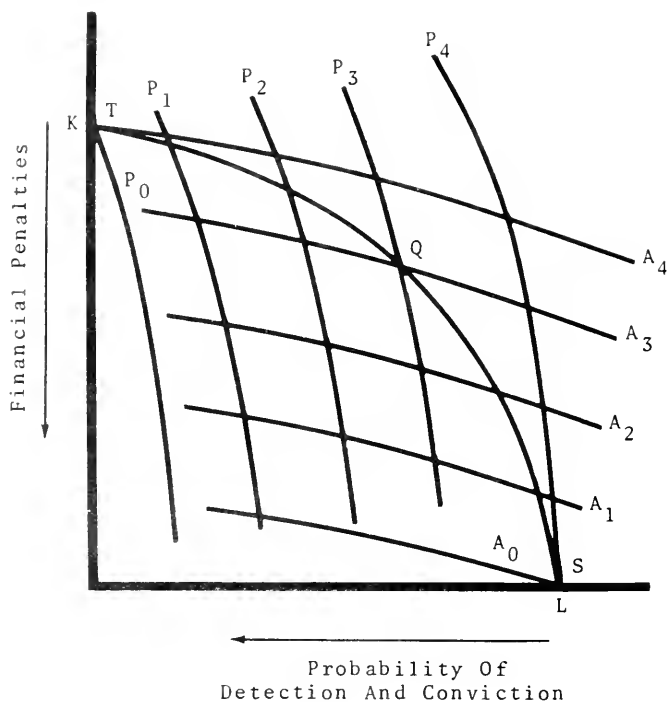


FIGURE 2

penditures of societal resources, antitrust policy places us at point Q , where the A_3 indifference curve of the risk averter cuts curve P_3 of the risk preferrer. The line KL passes through point Q and is drawn as an iso-expected value curve. By definition, any movement along KL leaves constant the expected value of the monopolist's profits, with any change in the financial penalty exactly compensated in terms of expected value by an opposite change in the probability of detection and conviction. The iso-expected value curve, a rectangular hyperbola, also represents the iso-expected utility curve of a risk-neutral businessman, a businessman who has no preference, say, between a ten percent probability of a \$10 loss and a 100 percent probability of a \$1 loss. KL can thus be thought of as the line that divides risk preference from risk aversion. The slopes of iso-expected utility curves at each point of intersection with KL are greater or less than the slope of KL , depending upon whether they represent risk preferrers or risk averters.

If we were to start at point Q on KL and were to allow both P and A to design any antitrust policy they wished, with the only

constraint being that the expected value of their monopoly profits would have to remain constant, we would expect each businessman to travel up or down the iso-expected value curve KL until he reached his highest iso-expected utility indifference curve. In our diagram, the risk averter reaches his highest indifference curve at point T , while the risk preferrer reaches his highest expected utility at point S . Point T represents relatively low monetary losses with a high likelihood of detection, while point S represents relatively high losses with a low probability of detection.

Of course, in reality both risk averse and risk loving managers must adjust their behavior to the same antitrust policy. We cannot allow them to choose the combination they each prefer under the constraint of a specific expected value of monopoly profits. With an initial policy placing them both at point Q , we can see that a new policy which would place them both at point S would move the risk preferrer to a higher indifference curve than he was on at point Q , but would move the risk averter to a lower curve than he was on at point Q . This means that by moving to point S the expected utility of the risk lover would rise relative to that of the risk averter. The risk preferrer would engage in or "demand" more anticompetitive collusion, boycotts, mergers, and the like while the risk averter would "demand" less. Put another way, the risk averter at point S will choose business practices and policies which involve less monopolistic activity because such activity offers him less expected utility. The risk preferrer, on the other hand, will engage in more monopolistic activity. He will receive more satisfaction from his monopoly profits when the probability of detection is low and the financial penalties high.

With any given antitrust enforcement policy, then, the degree of monopoly in the economy depends on whether managerial classes consist mainly of risk preferrers or risk averters. Changes in the risk attitudes of the managing classes may demand corresponding changes in antitrust policies. It is therefore highly pertinent to examine how risk attitudes of American business management have developed since the enactment of the Sherman Act in the late nineteenth century.²⁷

²⁷ In enacting the Sherman Act, Congress in all likelihood did not explicitly or implicitly consider the risk attitudes of American businessmen. The legislative history indicates that such matters were at best peripheral to the consideration of the legislation. Cf. H. THORRELLI, *supra* note 18. Nevertheless, as we have shown above, the ultimate effectiveness of the antitrust laws is in fact intimately related to management's attitudes toward risk.

III. THE PSYCHOLOGY OF MANAGERS AND ITS IMPLICATIONS FOR ANTITRUST POLICY

There is considerable evidence that today's business management is distinctly more cautious than its late nineteenth century counterpart; furthermore, this movement to risk aversion appears to be centered in the nation's oligopolies, those firms most subject to antitrust scrutiny. Joseph Schumpeter and Robert Aaron Gordon were among the earliest observers of this attitudinal change.²⁸ Schumpeter's sweeping description of the very success of capitalism smothering and making obsolete the entrepreneurial spirit dovetails with Gordon's careful investigation of large enterprise management. Gordon argued that the desire for security is "[v]ery probably . . . stronger among the leading executives of large and mature concerns than it was among an earlier generation of 'big' businessmen" ²⁹

Since Schumpeter's and Gordon's observations, other economists have also argued convincingly that the American economy has experienced a sharp increase in business prudence in recent decades. Both Robin Marris and John Kenneth Galbraith contend that control of large enterprises has passed from the individualistic entrepreneur to the organization-minded, group-oriented manager who is highly concerned with minimizing risk and uncertainty.³⁰ In the Galbraith-Marris corporate world, concern for individual and corporate security acts as an overriding constraint on desires for growth and profits:³¹

Today, when one young executive describes another as a "good businessman," more often than not he does not mean . . . a man with a good nose for profits, but rather a man who keeps his records in order, his staff contented, his contacts active and his pipelines filled; . . . not rash, but not suffering from inde-

²⁸ R. GORDON, *BUSINESS LEADERSHIP IN THE LARGE CORPORATION* 271-351 (1945); J. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 121-63 (3d ed. 1950).

²⁹ R. GORDON, *supra* note 28, at 283. See also *id.* at 310-11.

³⁰ J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 11-178 (2d ed. 1971); R. MARRIS, *THE ECONOMIC THEORY OF "MANAGERIAL" CAPITALISM* 1-109, 204-88 (1964).

³¹ R. MARRIS, *supra* note 30, at 57-58. Galbraith's description is consistent: These characteristics [of individualistic entrepreneurial behavior] are not readily reconciled with the requirements of the technosystem. Not indifference but sensitivity to others, not individualism but accommodation to organization, not competition but intimate and continuing cooperation are the prime requirements for group action. . . . The assertion of competitive individualism . . . to the extent that it is still encountered, is ceremonial, traditional or a manifestation of personal vanity and . . . self delusion.

J. GALBRAITH, *supra* note 30, at 92-93.

cision; a good committee man who knows both when to open his mouth and when to keep it shut.

The use of complex decision theory and organization theory has led other economists similarly to conclude that contemporary management wishes to avoid risk and uncertainty.³² These analysts portray a hired management interested not solely in maximizing profits but rather in pursuing a variety of goals; they describe a management geared to "homeostatic" business conduct rather than impetuous, swashbuckling strategies. According to many economists, then, the risk attitudes of contemporary management are well summarized by Sir J. R. Hicks' early observation: "The best of all . . . profits is a quiet life."³³

Economists have been joined by observers from other disciplines in noticing the changed risk attitude of contemporary management. William Whyte has argued that the displacement of the Protestant Ethic by the Social Ethic has led to the professionalization of management, strict pressures to conform, and constraints on individual expression.³⁴ Political scientist Antony Jay has compared the large corporation with the large state, arguing that both generate strong pressures to maintain the status quo. Jay believes that any risky moves that are made by today's management are aberrations, atypical phenomena having little connection with the risk attitudes of management at large.³⁵

Observers find, then, that modern enterprise lacks the Carnegies, Fricks and Firestones of an earlier era. Such entrepreneurs have been displaced by a gradual evolution propelled by factors such as increasing education; changes in the social environment of business; the steady separation of ownership from control in large corporate enterprises; the "technique orientation" and conformity that seem to characterize business education; and perhaps the very nature of bureaucracy itself. In terms of our earlier analysis, these factors have caused the risk preferers of the late nineteenth century to become the risk avoiders of the 1970's.

The implications of this attitudinal change for antitrust policy are clear. Policy designers should be highly sensitive to this change in risk attitude, realizing in line with our earlier analysis that a risk averse management is more likely to be deterred by

³² See, e.g., K. BOULDING, *A RECONSTRUCTION OF ECONOMICS* 26-38 (1950); R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM*, 118-19 (1963); Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 *AM. ECON. REV.* 253 (1959).

³³ Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 *ECONOMETRICA* 1, 8 (1935).

³⁴ W. WHYTE, *THE ORGANIZATION MAN* 18-22 (1956).

³⁵ A. JAY, *MANAGEMENT AND MACHIAVELLI* (1967) (see especially 189-98).

high financial penalties than by a high probability of detection and conviction with accompanying penalties not severe. Thus, in the framework of current attitudes toward risk, the deterrent benefits of a policy of raised fines far outweigh the deterrent benefits of expending additional enforcement resources.

IV. POTENTIAL OBJECTIONS TO RAISING FINES

Even given the relative deterrent benefits of increasing fines as opposed to increasing enforcement efforts, potential objections to a fine-oriented system still remain. First, it could be argued that judges and juries would be substantially less likely to convict a violator if such a conviction demanded a significantly higher fine. If this is true, a fine increase, even if enforcement efforts remained constant, would result in a decrease in the proportion of antitrust violators who are convicted. The decrease, the argument would assert, would result in the reduction of moral inhibitions against engaging in anticompetitive behavior and, as a consequence, would produce an increase in antitrust violations, even if management is risk averse and therefore initially inclined to avoid *any* flirtation with the increased penalties. This objection to a system based on higher fines rests on the belief that the moral, educative force of law is critical in influencing behavior and that to the extent that punishment occurs less frequently, that moral force is weakened.³⁶ Punishment, it is argued, greatly reinforces society's condemnation of inappropriate behavior. Hence, according to this argument, high fines which are seldom imposed would lead in the long run to more, rather than less, monopolistic behavior because the moral inhibitions against such behavior would be weakened.

However convincing this initial objection to a fine-oriented system appears at first glance, on closer examination it has two critical weaknesses. First, it is far from inevitable that statutory provisions for higher fines, even if mandatory, would impel judges and juries to punish fewer antitrust violators. Legislation which increased fines while eliminating private damage suits, for example, would clearly show that Congress intended the fine increase to be comprehensively implemented; this demonstrated intent could be expected to influence judges and even juries. Judges and juries would probably have a greater tendency to fine antitrust violations when assured that private treble damage actions would not follow. Furthermore, judges and perhaps juries

³⁶ See, e.g., Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L. & POLICE SCI. 176 (1952).

could be expected to recognize that with relatively fewer investigative resources devoted to punishing anticompetitive behavior, fines would now carry a greater deterrent burden.

Second, even if one ignores the real possibility that the increased moral inhibitions accompanying heightened financial penalties may in themselves compensate for the moral inhibitions lost by a decrease in the frequency of enforcement, the moral force argument is not a persuasive one. It assumes that the decision to engage in unlawful behavior is made largely on the basis of an individual's personal moral code. We believe, on the contrary, that, at least in the area of antitrust deterrence, the attitude of managers toward risk is far more important than any of their moral attitudes, and that antitrust policy will be more effective in deterring illegal behavior if it takes more account of the former than the latter. In consequence, a fine-oriented system would produce less, rather than more, monopolistic behavior. Until attitudes of business management toward risk change, there is no reason to expect that these risk averse managers would ever return to their former monopolistic practices once fines were raised. With less monopolistic behavior prevalent in society, surely the moral inhibitions against such behavior — and perhaps against all illegal behavior — would be reinforced, rather than weakened.

A second potential objection to an increase in fines is that the costs of such an increase would be greater than the costs of an increase in enforcement efforts. The increased expenditure of scarce judicial and administrative resources which would inevitably accompany a system in which the enforcement of antitrust laws was intensified would of course be unnecessary in a system which relied simply on imposition of heavy fines once convictions were attained. However, other less tangible costs might accompany an increase in fines. First, such an increase might augment the sense of inequity fostered by a system which penalized some but not all violators. The equity in an after-the-fact sense (*ex post* equity) involved whenever some violators of a law are punished and others allowed to go free decreases as the potential punishment increases. However, to achieve complete *ex post* equity in antitrust enforcement would entail the apprehension and punishment of *all* lawbreakers, an employment of resources that would clearly be too costly from the point of view of economic efficiency. At some point a balance must be struck. The crucial question is: how much is society willing to give up to achieve *ex post* equity?

The answer to this question should be at least partially determined by the amount of equity in the before-the-fact sense

(*ex ante* equity)³⁷ that exists in the system under examination. Whatever the *ex post* equity in a fine-oriented system, the *ex ante* equity in such a system is potentially close to perfect. Each risk preferrer who cold-bloodedly decides to violate the law and enter a cartel could be made to have the same probability of being caught as anyone else. In terms of the Government's enforcement efforts, each individual violator could have an equal chance of actually paying the fine. So long as the chances of being detected are equalized at the start under a clear set of rules, perfect *ex ante* equity can prevail. The existence of this almost perfect *ex ante* equity combined with the high costs of achieving additional *ex post* equity would seem to indicate that a high fine system would not unduly disturb the society's general sense of relative equity.

Other costs of an increase in fines may, however, be more significant. First, wholly apart from notions of *relative* equity, it may be that a high fine, if it represents a sum far in excess of the amount of damage done by a given antitrust violation, will unduly infringe on society's sense of *absolute* equity. Furthermore, extremely high fines could cause the collapse of businesses which at least have the potential of making substantial contributions to the national economy.

Both of these costs, however, rather than demanding that fines not be raised at all, simply indicate that there is some ceiling above which fines should not go. At least as applied to many American businesses, the current fine structure certainly does not exceed that ceiling. The Sherman Act's maximum \$50,000 fine is a pittance for many violators, threatening neither society's sense of absolute equity nor the violating company's existence. Nevertheless, the fact that there is a fine level beyond which marginal costs begin to be greater than marginal benefits should be kept in mind in designing a specific proposal for a fine-oriented system.

V. THE FINE: A SPECIFIC PROPOSAL

It should be clear from this discussion that the same absolute monetary exaction should not be set by statute for every antitrust violator.³⁸ An absolute fine level that might be an enor-

³⁷ The distinction between *ex ante* and *ex post* equity is that of Mark V. Pauly and Thomas D. Willett. See Pauly & Willett, *Two Concepts of Equity and Their Implications for Public Policy*, 53 SOCIAL SCI. Q. 8 (1972).

³⁸ As noted at p. 697 *supra*, Senator Hart has advocated that the maximum Sherman Act fine be raised from \$50,000 per count to \$500,000. His proposal, it should be noted, does not envision the elimination of private damage suits.

mous deterrent for small firms might not deter larger firms from anticompetitive activity. What we are seeking is a fine that is large enough in the case of each individual firm to make its management unlikely to violate the antitrust laws, but which is not so large as to cause a violator to go out of business or to offend our sense of absolute equity. Thus, we must think in terms of fines based on proportions rather than absolute amounts. These proportions should be of such a size, and applied in such a way, that the resultant fine would "hurt" each firm just enough to deter a risk averse manager.

Four possible measures of a firm's "ability to pay" come to mind. In the application of the first standard, managerial salaries, fines would be assessed against the managers themselves. With the other three alternative measures — sales, assets, and profits — the fines would be assessed against the violating firms.

Levying fines on managers themselves would not be without advantages. While economists are no longer highly prone to emphasize the separation of ownership and control in large corporations, it is still the case that some managers' actions may be insulated from stockholder control and reprisals. These managers may not be as much deterred by a potential fine on their companies' sales, assets, or profits as by the prospect of losing a percentage of their own salaries. Consequently, there is a great temptation to fine directly the businessman engaged in the illegal activity. Indeed, one of the proffered purposes of the Clayton Act was to enable punishment to be applied to the source of the violation.³⁹ If accomplished, this would seem not only to effectuate solid deterrence but also to constitute an equitable incidence of the fine. A manager willfully engaging in anticompetitive behavior should not be able to use a corporate shield to escape punishment.

Two factors, however, persuade us to reject levying a proportional fine upon managerial salaries. First, the task of clearly identifying those responsible for anticompetitive behavior, especially in large corporations, might be excessively difficult to

³⁹ In his message to Congress of January 20, 1914, in which he proposed new antitrust legislation, President Wilson said:

. . . we ought to see to it . . . that penalties and punishments should fall not upon business itself, to its confusion and interruption, but upon the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn. Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible, and the punishment should fall upon them, not upon the business organization of which they make illegal use.

51 CONG. REC. 1963 (1914).

accomplish;⁴⁰ managers would be encouraged to develop very subtle methods of concealing the origins of anticompetitive behavior so that responsibility for the behavior could not be traced to them. A fine based on salaries could thus fall on those not responsible for the illegal activity. Indeed, judges, unsure that imposed fines would fall on the real violators, might be reluctant to impose fines high enough actually to deter; and convictions might be fewer if such fines were mandatory.

Second, the gains to be had from anticompetitive behavior are frequently so large relative to the salaries of the managers involved that boards of directors would find it tempting to arrange for hidden side payments as "bribes" to management to engage in violations of the antitrust laws. With potentially huge rewards for anticompetitive action, even a 100 percent fine on salaries would constitute a small amount relative to the potential monopoly gains to the firm; the existence of such potential "gains from trade" would clearly invite the development of means to circumvent the fine structure. Thus, although in an abstract sense levying fines on managers' salaries would unquestionably be an effective deterrent, practical problems of implementation would seem to dictate that the use of such a standard be rejected.

We turn, therefore, to the alternative standards which impose fines on the violating firms themselves. The sales figure standard has the advantage of being the least susceptible to illegal manipulation. This fact indeed may have led a recent study group to recommend that violations of the Sherman Act be punished by fines equal to a percentage of the violator's sales.⁴¹ However, the benefits of using a sales standard are more than offset by the disproportionately heavy impact that a fine on sales would have upon some firms. Firms with low profits/sales ratios would be hurt far more than those with high profits/sales ratios. In fact, a percentage fine in the 1 to 5 percent of sales range that could

⁴⁰ Reflecting on his hearings on the electrical equipment cartel of the late 1950's, Senator Estes Kefauver wrote:

[I]t has been found that many times, top corporate executives "wink" at criminal antitrust violations going on right under their noses. Rather than assure that the antitrust laws were being obeyed by their subordinates, such executives take great pains to make certain they have no "knowledge" of any illegal activities.

Press Release of Senator Estes Kefauver, July 13, 1961, quoted in Note, *Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 303 n.71 (1961). See also *id.* at 297, 302.

⁴¹ M. GREEN, *supra* note 14, at 175. The basic proposal of this Nader study group was a fine ranging from 1% to 10% of the violating firm's sales (during the time of the violation) for the first offense and 5% to 10% of sales for a second violation within a five year period.

cause a retailing firm with a high inventory turnover to go out of business might be easily endured by many manufacturing firms. The deterrent value, equity, and destructive potential of a fine based on sales, then, would fluctuate so widely with the character of the violating firm that the sales standard should be rejected.

Basing the fine on assets would of course produce the same problem of widely varying impacts. On committing identical offenses, firms with low profits/assets ratios would in effect pay greater fines than firms with high ratios. Fines more than adequate to deter anticompetitive behavior in manufacturing firms (in which there is large investment in durable capital) might not dissuade the management of retailing or other merchandising enterprises with relatively few assets. In addition, the fact that varying depreciation methods in different industries exert a significant effect on the asset figure further reduces its usefulness as a peg upon which to hang the fine structure.⁴²

A firm's profits constitute a far more desirable standard for the imposition of fines than either the standard of sales or that of assets. The profit standard would go further than either of the other two toward providing a constant impact, regardless of the sales-assets structures of the firms that are potential violators. Specifically, we recommend that antitrust violations be penalized exclusively by a mandatory fine of 25 percent of the firm's pre-tax profits for every year of anticompetitive activity.⁴³ Government tax returns would provide a very convenient measure by which to determine the relevant profit figure.

The 25 percent figure, we stress, is not to be taken as either an estimate of the firm's profits attributable to its antitrust violation or an estimate of the misallocative damage done to society by the firm's anticompetitive activity. Rather than being concerned with compensation, our proposal is directed solely toward deterrence; the 25 percent figure would seem sufficient for this purpose. Even a management relatively isolated from its firm's owners still would feel the impact from a fine of this magnitude. The experience of lower stock prices, greater difficulties in attracting funds, and an increased probability of a takeover bid would be unpleasant consequences of such a fine. The 25 percent figure would, on the other hand, not seem so high as to cause violators to go out of business, and not so onerous as to offend the society's sense of absolute equity.

⁴² Moreover, during a time of inflation, a fine based on assets might impose greater hardships on new firms than on old ones since the older firms are more likely to have their assets undervalued.

⁴³ Under our proposed system corporate dissolution might still be used in some cases but only when its remedial benefits clearly warrant its use. See p. 696 *supra*.

There are, of course, some problems in basing the fine on a percentage of company profits. Economists have long noted the inability of current accounting practices to reflect costs rationally and consistently; the vagaries of cost accounting are necessarily reflected in the profit residual. This results in two problems: (1) a fine on profits may have some disproportionate effects due to different accounting practices among firms and across industries, and (2) the malleability of cost figures, coupled with a potential fine on profits, gives management added incentive to hide profits. For example, a firm may have opportunities to engage in activities providing attractive tax shelters. Under our proposal of a 25 percent fine on profits, such tax shelters would benefit a firm not only with tax savings but also with lower antitrust fines.⁴⁴ However, insofar as these problems are deemed substantial, they could be addressed by devising regulations which would use income tax profit figures not as a final base from which to compute antitrust penalties but rather as a starting point for computations.⁴⁵

Our proposal might seem to impose an inappropriately heavy burden on multidivision firms, since the proposed fine is based on a given firm's aggregate profits while a particular antitrust violation might have been perpetrated by only one of the company's divisions. This "disproportion," however, is one of the strengths of the profits measure. Multidivision firms, because of their typically large size, are generally considered the firms most likely to inflict serious welfare losses when they engage in anticompetitive behavior. More importantly, huge multidivision firms, with many sources of profit, would probably not be "hurt" or deterred by the threat of losing a portion of profits in only one division. Furthermore, imposing even relatively frequent but relatively low fines on the profits of single divisions of conglomerates would have particularly little deterrent effect if, as we earlier concluded, management is generally risk averse, and if the size and diversity of the enterprise makes the incidence of such fines more or less statistically predictable.

The benefits of determining antitrust fines by a profit standard, then, outweigh the costs of using that standard. Considera-

⁴⁴ This problem should not be overstated. It is unlikely that our proposal would cause corporations to engage in much further tax-sheltered activity. Already existing inducements to minimize taxable income have probably exhausted concealment options.

⁴⁵ Incremental concealment of profits could if necessary be made less appealing by adjusting the profit figure for antitrust penalty purposes so as to take into account returns which are otherwise hidden through sheltering devices. Firms would then be fined on the basis of an adjusted profit figure.

tions of efficiency, ease of administration, and equity together compel the conclusion that the profit standard is the most desirable of the four options that have been analyzed here.

VI. CONCLUSION

We have shown that, given the general risk aversion of American management, it is more efficient to deter antitrust violations by heavy reliance on the level of financial penalties than by heavy reliance on the probability of detection and conviction. Furthermore, we have argued that penalties should be in the form of fines rather than in the form of private reparations. By eliminating the resource consuming processes involved in the determination and allocation of private damages, our proposal would, we feel, enable society to achieve the present degree of deterrence at lesser social cost or a much greater degree of deterrence at the same cost.

In advocating reliance on a single penalty instead of a host of weapons, and in recommending the elimination of private damage suits, a mechanism which has been called the "strongest pillar of antitrust,"⁴⁶ we are not, we stress, calling for a weakening of the antitrust laws. On the contrary, we are convinced that more discouragement of anticompetitive behavior is needed. However, an analysis of the benefits and the costs of any alternate antitrust policies moves us to reject the antitrust literature which simply recommends doing more of everything — more fines, longer jail terms, bigger government budgets, enlarged rules of standing, generally easier access to the courts — with little discussion of the relative efficiencies and costs of these several approaches.

⁴⁶ Loevinger, *Private Action — The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

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